IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 719

MAMMOTH OIL COMPANY, *et al.*,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MEMORANDUM BRIEF OF PETITIONER MAMMOTH OIL COMPANY IN REPLY TO THE BRIEF OF THE UNITED STATES

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IN THE

Supreme Court of the United States

October Term, 1926.

No. 719.

MAMMOTH OIL COMPANY, SINCLAIR CRUDE OIL PURCHASING COMPANY and SINCLAIR PIPE LINE COMPANY, Petitioners, vs. THE UNITED STATES OF AMERICA, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

MEMORANDUM BRIEF OF PETITIONER MAMMOTH OIL COMPANY IN REPLY TO THE BRIEF OF THE UNITED STATES.

Introductory Statement.

As indicated in their preliminary statement of the case, Counsel for the Government seek in their brief to establish two propositions, (1) that the Court of Appeals found the lease and contract here in controversy fraudulent irrespective of the finding of bribery and (2) that the decision of this Court in the *Pan American* case is decisive of the issues here.

The four main heads of the Government's argument are:

> "B. Appellee's Statement of the Facts" (brief, pp. 26-61).
>
> "C. The Fraudulent Character of the Lease and Contract" (brief, pp. 61-134).
>
> "D. The Legal Sufficiency of the Proofs of Fraud and Conspiracy" (brief, pp. 134-173).
>
> "E. The Illegality of the Lease and Contract" (brief, pp. 173-212).

Counsel for the Government frankly place their statement of the facts under the heading of argument. Their statement of the facts gives an entirely incorrect view of the evidence and therefore, if accepted as the correct view, would lead to an entirely erroneous conclusion by the Court. Moreover, innuendo is woven into the evidence, sequence of events is changed and diverted and the evidence of the Government's own witnesses as well as witnesses called by defendants, is criticized and wherever unfavorable to the Government rejected and conjectures are substituted for such evidence. Owing to the shortness of the time and the necessity for brevity, we shall not attempt to review the Government's statement of the facts but will at the end of this memorandum point out examples of such erroneous and misleading views of the evidence.

Moreover, we shall not notice in detail the matters stated from pages 61 to 134 under the heading of "The Fraudulent Character of the Lease and Contract" as we do not desire to repeat what we have said in our main brief and as such matters may be sufficiently noticed for

our present purposes under Government Counsel's next heading, "The Legal Sufficiency of the Proofs of Fraud and Conspiracy."

The So-called "Badges of Fraud and Conspiracy".

Under this heading Counsel at pages 134 to 136 of their brief list fifteen alleged "badges of fraud and conspiracy" which summarize their argument that the lease and contract here were fraudulent. The so-called "badges of fraud and conspiracy" are stated as follows:

> "1. The policy of conserving the oil in the ground as long as possible, and of making only protective leases for offset purposes, was changed to one of exploiting the whole Reserve.
>
> "2. The policy of leasing only pursuant to advertisement and competitive bidding was changed to private negotiation.
>
> "3. In the private negotiations with Sinclair, competition for the lease, for the purchase of the royalty oil and for the erection of storage tankage was eliminated.
>
> "4. The quit-claiming of placer claims known to be invalid was made a condition precedent to a lease, and only Sinclair was given any practicable opportunity to secure the claims.
>
> "5. Applicants other than Sinclair for leases were told no leasing was contemplated or, as in the case of Beaty and Helms, were not given information on which a comparable bid could be made or time in which to make a bid.
>
> "6. Newspapers, the general public, senators and congressmen were denied information and affirmatively misled to avoid competition and opposition to the plan.

"7. Negotiations were so shrouded with secrecy that even departmental subordinates did not know what was being done and did not know of the change in policy.

"8. Subleases were clandestinely promised to two persons desirous of territory in the reserve.

"9. The possibility of drainage was exaggerated and used as a justification for the lease, but not in good faith.

"10. After doubts as to the legality of the plan were expressed by eminent attorneys, submission of the question to the Attorney General or Solicitor for the Interior Department was studiously avoided.

"11. The lease was drafted in secrecy in the office of Sinclair's attorney.

"12. Fall dominated the negotiations leading up to the making of the lease.

"13. Sinclair bribed Fall with $230,000 worth of Liberty Bonds.

"14. Neither Sinclair nor Fall were called by appellants to testify. Everhart claimed privilege against self incrimination. Other witnesses with knowledge of important facts refused to testify.

"15. Sinclair got a lease estimated to be worth in profits to his company over $33,000,000."

As we have pointed out at page 10 of our main brief this Court has held that the words "fraud" and "conspiracy" no matter how often repeated or charged cannot make a case for the interference of a court of equity until connected with some specific acts for which one person is in law responsible to another. They are merely words of unpleasant signification,—meaningless, unless

coupled with acts resulting in injury or damage to the plaintiff. Counsel in their brief have again and again used the word "fraud" in connection with certain matters without pointing out wherein the matters are fraudulent. But on page 138 of their brief they make a general statement which seems to indicate what they are talking about when they say "fraud". They say:

> "The particular type of fraud with which we are concerned in the present case is collusion between an agent and a third party dealing with that agent. *The fraud consists of improper motives upon which the third party induces the agent to act* and as a result of which the agent does act in whole or in part." (Italics ours.)

In other words, they here charge actual, intentional fraud and dishonesty of purpose. In the light of the position so announced by Counsel, let us consider briefly the so-called badges of fraud and conspiracy. We shall not take time to discuss each of them separately but our position may be illustrated by reference to a few of them.

The first so-called badge consists of a charge that the policy of conserving the oil in the ground was changed to one of exploiting the whole reserve. That, of course, begs the issue. We have shown from the evidence and both the lower Courts have found from the evidence, that the lease here in controversy was made as a protective measure to save the Navy's petroleum in Teapot Dome. If this Court finds that the action of the Secretary of the Navy in making the lease for that purpose was a capricious exercise of discretion wholly unsup-

ported by any evidence which would justify it, then the lease and contract will be held unlawful. But is there any evidence that the parties here intended to make a lease which they knew to be unlawful? Did they knowingly and intentionally set about to make a lease which they knew was in violation of the law or injurious to the Government? We assert that there is no such evidence and that the lease may not be held to be fraudulent upon any finding that it was not authorized by law.

Similarly, other alleged badges of fraud relating to the question of advertisement and competitive bidding beg the question. It is a question of law here whether advertisement and competitive bidding were required in the making of this lease. If this Court holds that advertisement and competitive bidding were required, then the lease may be held unlawful, not upon the ground of fraud but because of illegality. There is no evidence and could have been no evidence that either the Government officials or Sinclair knew that competitive bidding was required. To make a mistake of law is one thing; to intentionally violate the law with an improper motive is quite another.

Others of the so-called badges of fraud relate to the alleged secrecy. It is not shown that secrecy to the extent that it was observed in the making of the lease was unlawful; it is not shown that such secrecy resulted in any damage or injury to the United States; it is not shown that the Mammoth Oil Company or Sinclair had anything to do with the secrecy or had any knowledge of it. How, therefore, could the Mammoth Oil Company or Sinclair have been guilty of fraud in respect of secrecy

in the sense that Counsel here say they are using the word fraud?

Indeed Sinclair is not shown to have had any knowledge of most of the matters in respect of which Counsel for the Government raise the cry "badges of fraud". He was not responsible for the making of the removal of the cloud in the Government's title to Teapot Dome a condition precedent to a lease. He was not responsible and had no knowledge of any alleged exclusion of other bidders. He had nothing to do with the question of whether or not the Attorney General should be consulted in reference to the lease. Is it not clear when Counsel say "the fraud consists of improper motives upon which the third party induces the agent to act" that they mean that the fraud consists of bribery? How is it claimed that Sinclair induced Secretary Fall to act on improper motives? The answer is found in the charge contained in the 13th alleged badge of fraud, namely "That Sinclair bribed Fall with $230,500 worth of Liberty Bonds."

The Court of Appeals recognized the situation. It found that Secretary Denby did not, under the facts as to drainage submitted to him, act arbitrarily or capriciously or abuse his discretion in determining to lease Teapot Dome. It found as to the manner of leasing, that no general statute of the United States had been violated. It found, impliedly at least, that the United States was in no way injured or damaged through the making of the lease. Finally, it recognized that the only question of fraud in the case was whether Secretary Fall received a pecuniary favor from Mr. Sinclair and it predicated its finding of fraud solely upon that issue of bribery.

At pages 8-12 of their brief, Counsel say that the Court of Appeals held that there was some vague sort of fraud in this case outside of the question of bribery. They say:

> "All of the other elements of fraud were examined by the court and commented upon by the court before it took up the evidence as to bribery. And the evidence as to bribery is treated as but one element or item in the many significant transactions which spell favoritism, secrecy and fraud" (Brief pp. 11-12).

What is the fact of the matter? The Court of Appeals begins its discussion of the question of fraud at page 816 of this record. After stating that there is no charge of corruption in the case as to any officer of the Government except Secretary Fall, after stating the theory of the Government that Mr. Sinclair bribed Secretary Fall, and after saying "If a Government official, engaged in making contracts for the Government, *receives a pecuniary favor* from one with whom such contracts are made, a fraud is committed on the Government" (R. 817), it states at the bottom of page 818 that it will proceed, therefore, to a somewhat extended examination of the record and sift from the mass of evidence the important and relevant parts. It then proceeds through pages 819 to 847 to review the Continental Trading Company matter and all other matters which presumably it considered important and relevant on the question of fraud. Included therein were all the matters listed by Counsel in their brief as "badges of fraud" except the first one. At the conclusion of its review the Court of Appeals says:

> "Is a court to say that because none testified as to the actual transfer of the bonds that a fatal missing link in the evidence exists? We conclude not. The reasonable, proper and natural inferences and presumptions from the accrual of condemnatory incidents appearing in this record supply the so-called missing links in the testimony and satisfy us of Sinclair's connection with the Continental Trading Company, Ltd., and with the acquisition of the Government Liberty Bonds by Everhart and Secretary Fall" (R. 847).

In other words the finding of fraud made by the Court of Appeals was that Sinclair delivered Liberty Bonds to Secretary Fall and conceding that there were missing links in the testimony that Mr. Sinclair delivered any bonds to Secretary Fall, the Court said that the inferences which it drew from the "condemnatory incidents appearing in this record" supplied the missing links which it has just said existed because no one testified as to the actual transfer of the bonds and satisfied it (of what?) "of Sinclair's connection with the Continental Trading Company, Ltd., and with the acquisition of the Government Liberty Bonds by Everhart and Secretary Fall."

What did the court mean by "condemnatory incidents"? The only natural and reasonable inference is that it meant the incidents which it stated at the outset of its discussion of fraud it would review and which as a matter of fact it did consider and discuss. The incidents so considered and discussed include all of the matters referred to by Counsel for the Government as "badges of fraud and conspiracy" except the first one listed by Counsel. As to the matter covered by that one the Court

of Appeals found that the facts in evidence authorized the lease.

As we demonstrated in our main brief, the Court of Appeals simply drew inferences from other matters in no way related to Liberty Bonds as a further basis for the two final inferences which it drew that Mr. Sinclair was connected with the Continental Trading Company, Ltd., and with the acquisition of Government Liberty Bonds by Fall.

The Argument as to the Sufficiency of the Proof of Fraud.

After setting forth their fifteen "badges of fraud and conspiracy", Counsel in effect recognize that bribery is the issue in that not only the statements of principles which they make under their next sub heading of "The Test of the Sufficiency of the Proof of Fraud" relate to bribery, but also the cases they cite thereunder are all cases involving bribery of a public official. We dispute neither the principles nor the authorities and we assert that neither have any application to the case at bar.

At page 137 Counsel say, "If Sinclair knew or reasonably suspected that in awarding the contract to his company, Fall was actuated by any motives other than the procurement of the greatest advantage to the United States and the giving of equal opportunity to every would-be contractor, the resulting contract is fraudulent and unenforceable." Is there anything in the record to show that Fall was actuated by any motive other than the procurement of the greatest advantage to the United States? The evidence is, and the concurrent findings of both courts below is, that the lease was highly advantageous to the United States and better than it could have gotten from any other lessee. There is no evidence

that Mr. Sinclair knew or reasonably should have known what terms any other person desired to make with the Government but there is also no evidence that anybody else did offer any better terms than did Mr. Sinclair.

At pages 140 to 144 inclusive, Counsel for the Government cite cases to the effect that fraud may be proved by circumstantial evidence. But in none of the cases cited were inferences drawn from inferences or from rebuttable presumptions. In each case not only were there ample facts proved but they were such that no conclusion other than wrongdoing could fairly or reasonably be drawn from them. In none of the cases were the facts proved fairly or reasonably consistent with innocence.

At pages 140 to 141, Counsel quote from the case of *Rea* v. *Missouri*, 17 Wall. 532. The language quoted probably sufficed as a general statement of the point that the court was there seeking to make.

It does not show with any clearness or state with any certainty the rule governing the proof of fraud by circumstantial evidence. Indeed, it is intended to be so general in its nature as not to descend to particulars. The rule itself, as laid down by the courts, does descend to great particularity. In the above case the Court calls attention to "the great mass of evidence tending to prove" the frauds.

In *Glaspie* v. *Keator*, 56 Fed. 203, cited by Counsel at page 141 of their brief the Court points out that there was evidence which fully warranted a finding that the vendor had made representations to the purchaser which he at least believed to be untrue even if he did not know it. The Court also points out evidence in the case clearly indicating that the defendant Glaspie had caused the vendor to make the sale and the representations. A mo-

tion was made below that the jury be instructed to find that the defendant had not been guilty of any fraud or deceit. The Court below denied the motion and the jury found a verdict of guilty and the Court of Appeals affirmed. The evidence was abundant. The case was decided in accordance with correct principles.

In *Drake* v. *Stewart*, 76 Fed. 140, cited by Counsel at page 142 of their brief, there had been a directed verdict for the defendant. The Court shows clearly that the evidence was strong in every point against the defendant. Indeed, the Court says at page 143, "the evidence conclusively proved Bloss intended to keep the plaintiff in prison in the county jail without bail, through the night, and that he successfully accomplished that purpose." Nothing remained to the Court of Appeals but to reverse the case.

In *Drennen* v. *Southern States Fire Insurance Company*, 252 Fed. 776, cited by Counsel at page 143 of their brief, the last sentence of the quotation made by Counsel is sufficient to show what the Court held there. The facts there held to be sufficient were facts "from which an *inevitable* inference is to be drawn." (Italics ours.)

The case of *Attorney General* v. *Pelletier*, 240 Mass. 264, cited by Counsel at page 144 of their brief, is quoted from by Counsel in another connection at page 154 of their brief. As appears from the quotation at the latter page, "there was ample evidence introduced by the informant tending to prove that the respondent was guilty of many of the charges set forth in the information."

In *Lumpkin* v. *Foley*, 204 Fed. 372, cited by Counsel at page 144 of their brief, the statement by the court

shows the character of the evidence considered in that case. At page 378 the court, in speaking of the findings of the court below, stated that those findings "are abundantly sustained by all the evidence in the case".

In *Ware* v. *United States*, 154 Fed. 577, cited by Counsel at page 144 of their brief, the court points out that neither of the entrymen in any way occupied the lands; that Ware and his company did occupy them; that Ware was instrumental in causing the entries to be made and that there were many other facts which constituted not only ample but almost conclusive evidence.

In *Castle* v. *Bullard*, 23 How. 172, cited by Counsel at page 144 of their brief, the question did not relate to the weight to be given circumstantial evidence or inferences to be drawn from it but to the admissibility of evidence of a circumstantial character.

The Government's Argument that Silence is Proof.

At page 145 of their brief Government Counsel under the heading "The Silence of Sinclair is Evidence of Fraud" state "That the suspicious circumstances which it proved derived additional weight from the failure of Sinclair to take the stand." The facts which we have heretofore considered in the analysis of the Government's brief, characterized by Government Counsel to be, "proved facts resolved into badges of fraud", are now characterized as suspicious circumstances. We submit that Counsel misconceive the true rule as to silence. The alleged silence of Sinclair will not supply proof not made.

Counsel seek to escape the consequences of their inability to adduce proof of fraud by attempting to bring

their case within the well known principle that where there is affirmative evidence tending to fix a liability upon a party, additional weight may be allowed to the evidence against such party if he remains silent, notwithstanding full knowledge of all the facts is laid at his door.

In our view, Counsel, in making this attempt, have misstated both the facts of this case and the principle of law as to deductions from silence. We shall not attempt to follow the criticisms leveled by Counsel at the Trial Court upon this point, believing these criticisms show their own unworthiness and baselessness, but shall content ourselves with drawing from the authorities a statement of the principle as to silence, and then making application of that principle to the facts. That principle we submit, is that mere silence of a party will not supply lacking affirmative proof against him, but may be considered in weighing proofs already adduced tending to fix a liability upon him in matters where complete and more or less exclusive knowledge of the facts, concerning which he is silent, is laid at his door.

> *W. F. Corbin & Co.* v. *United States* (C. C. A. 6), 181 Fed. 296, 303:
>
> "An attentive examination of the record discloses no direct evidence tending to prove that the barrels were in a substituted condition when received by the claimants, nor are there, in our opinion, such facts and circumstances proven from which it might be reasonably presumed that the claimants received the packages in a substituted condition, unless it be assumed that the conduct of the claimants in remaining silent and offering no evidence tending to prove that the substitution

was made after they received the packages, or for that matter, offering any explanation as to when the substitution was made, can be used as a basis for the presumption that the barrels were in a substituted condition when they received them. If the verdict of guilty be predicated upon the assumption that the jury found from the evidence that the barrels of whisky were in a substituted condition when they were received by claimants, it must have been based upon the presumption that the whiskies, having been in that condition when seized, were therefore in that condition when received by claimants.

"The only basis for such a presumption disclosed in the record is the silence of the claimants themselves, and the total absence of any explanatory evidence touching the time when the substitution was made. But can such a presumption be indulged?

"There is a line of cases which hold that when a party to an action has in his exclusive possession a knowledge of facts which would, if disclosed, tend to throw light upon the transaction which is the subject of controversy, his failure to offer them in evidence may afford a presumption against him. Clifton *v.* U. S., 4 How. 242, 11 L. Ed. 957; Kirby *v.* Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463; Commonwealth *v.* Webster, 5 Cush. (Mass.), 316, 52 Am. Dec. 711; Quantity of Distilled Spirits, Fed. Cas. No. 11,494; The Silver Moon, Fed. Cas. No. 12,856; United States *v.* Chaffee, Fed. Cas. No. 14,774; United States *v.* Mathoit, Fed. Cas. No. 15740. These cases hold that the silence of a party to an action may be the basis of a presumption against him to the extent of strengthening other evidence so as to warrant a finding against him, which, in itself, is not sufficient

to warrant such a finding, *but they do not go to the extent of holding that, where there is a total lack of evidence tending to show guilt, mere silence of the party proceeded against—may be the basis of a presumption of his guilt*" (Italics ours).

Owens Bottle Mach Co. v. *Kanawha Banking & Trust Co.* (C. C. A. 4), 259 Fed. 838, 842:

"In the course of the oral argument it was suggested that Martin's authority was inferable from the fact that, though present in court, he was not called as a witness, and that plaintiff offered no testimony, on the issue raised by defendant's plea of set-off. The rule of law is otherwise. In Wigmore on Evidence, vol. 1, par. 280, subsec. 5, it it stated thus:

'The opponent whose case is a denial of the other party's affirmation has no burden of persuading the jury, therefore, until the burden of producing evidence has shifted, he has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he takes a risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise, the first party would virtually be evading his legitimate burden.'"

Stimpson v. *Hunter*, 234 Mass. 61:

"The failure of the defendant and of his son to testify although present in Court was not equivalent to affirmative proof of facts necessary to maintain the action. The defendant was not bound to offer any evidence unless and until evi-

dence was offered by the plaintiff warranting the submission of the case to the jury."

Shotwell v. *Dixon*, 136 N. Y. 43:

"Nor do we think the appellant's other contention—that, because the defendants were not sworn as witnesses in the case, the court may assume that a cause of action exists without the proof necessary to constitute it—can be upheld. So long as the plaintiff had not established a cause of action against them, they were neither required to make a motion for a nonsuit to protect their rights, nor were they called upon to introduce evidence to contradict or explain facts which were insufficient to establish any liability against them."

Texas & Pacific Ry. Co. v. *Shoemaker*, 98 Texas, 451:

"It is urged that the defendant should have produced the evidence of those on the engine to explain their connection with the tragedy. It appears that the engineer died before the first trial but sometime after the suit was brought, and that the fireman is still living and in the service of the defendant. The manner in which their train passed the point of the accident and proceeded on its way indicates strongly that those on the engine did not know of the occurrence. * * * A defendant cannot be called on to produce evidence where the plaintiff has failed to bring sufficient proof to prima facie sustain his cause of action."

Loper v. *Askin*, 178 App. Div. (N. Y.) 163, 164:

"When the plaintiff rested her cause of action was not made out. Hence no inference could be

drawn because defendant was not sworn. Defendant is not called upon to introduce evidence to contradict or explain facts which were insufficient to establish any liability against her."

Other cases to the same effect are:

Omar Oil & Gas Co. et al. v. *Bair Oil Co. et al.*, 285 Fed. 588;

Blackman v. *Andrews*, 150 Mich. 322, 114 N. W. 218;

Chicago Mill & Lumber Co. v. *Cooper*, 90 Ark. 326; 119 S. W. 672;

Thompson v. *Daviette*, 59 Ga. 472;

Lowe v. *Massey*, 62 Ill. 47;

City of New Orleans v. *Gauthreaux*, 32 La. Ann. 1126.

In support of their apparent proposition that silence of a party constitutes affirmative evidence against him and supplies proof of facts not otherwise shown, Counsel cite a number of cases. It seems to us that not one of these cases, as applied to the facts in the instant case, supports their contention.

Counsel for the Government, at page 149 of their brief, cite the case of *Bilokumsky* v. *Todd*, 263 U. S. 149, and furnish the Court with a single quotation from this case which, detached from the text and meaning of the case, might have a tendency to mislead. The quotation cited is (at p. 153):

> "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character."

Bilokumsky was arrested, in deportation proceedings, upon a warrant of the Secretary of Labor, as being an alien within the United States, in violation of law, the specific ground being that he had in his possession for the purpose of distribution printed matter which advocated the overthrow of the Government by force. He was accorded a hearing to enable him to show cause why he should not be deported, after which a warrant of deportation issued. While in the custody of the immigration authorities he filed a petition for a writ of habeas corpus, which was heard on a return and traverse and dismissed, and his appeal was taken under Section 238 of the Judicial Code. At the hearing which resulted in an order of deportation, all of the facts necessary to prove that Bilokumsky had in his possession for the purpose of distribution printed matter which advocated the overthrow of the Government by force were established without objection. *To prove alienage*, the inspectors called Bilokumsky as a witness. He was sworn but when questioned by the immigration inspector, under advice of counsel stood mute, refusing even to state his name. After this refusal an examination which had been taken of Bilokumsky in the Moyamensing Prison was introduced, in which *he had admitted that he was an alien*. He did not testify on his own behalf in the deportation proceedings, nor did he or his counsel make any claim that he was a citizen of the United States. This hearing under the warrant of the Secretary of Labor was conducted under certain rules, of which Rule 22, subdivision 5 (a) is as follows:

> "Upon receipt of a telegraphic or written warrant of arrest, the alien shall be taken before the

> person or persons therein named or described and *granted the hearing, to enable him to show cause, if any there be, why he should not be deported.*"

Under these circumstances, this Court said, amongst other things (at p. 153, 154):

> "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character. * * * If Bilokumsky was a citizen, inquiry into the fact was immaterial; and the whole proceeding must have fallen. He, presumably, knew whether or not he was a citizen. Since alienage is not an element of the crime of sedition, testifying concerning his status could not have been a tendency to incriminate him. There was strong reason why he should have asserted citizenship, if there was any basis in fact for such a contention. Under these circumstances his failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien."

It is perfectly clear from the facts and from the full reading of the opinion that this Court simply held that officers charged with the administration of the Immigration Law were permitted to draw an inference from the silence of one who was called upon to speak, especially when his admission of alienage had been introduced against him.

In the case of *Runkle* v. *Burnham*, 153 U. S. 216, cited by Counsel at page 150 of their brief, a quotation made by Counsel relates to a certain power of attorney. This particular power of attorney was introduced in evidence. There was a claim that it was revoked, but no evidence of its revocation. This Court said:

> "True there is evidence tending to show that Mestre, the agent of Runkle in Havana, requested enlarged powers from Runkle, and there is also evidence tending to show the arrival at Havana on the day on which the contract was made of an instrument conferring the enlarged powers which Mestre deemed desirable to justify him in dealing with the city of Havana. There is, however, no evidence that the second power if received revoked the power which is in evidence."

The burden was on Runkle to show the revocation and he failed in that proof. The Court, moreover, indulged the inference that the new power did not revoke the old because Runkle failed to produce it. This does not make affirmative evidence out of his failure but is a comment, in passing, strengthening the right to find against him on an issue, the burden of which was upon him and on which he failed to produce any evidence.

Counsel also cite at page 150 of their brief *Penna. R. R.* v. *Anoka Nat. Bk.* (C. C. A. 8), 108 Fed. 482, 486. In that case it will be observed that the familiar rule is again enforced. Plaintiff in an action against a railroad company introduced evidence which tended strongly to show that the defendant managed and controlled the line of the road on which the loss occurred, although it was owned by a separate corporation. And the defendant, although having it within its power, failed to produce evidence to show the actual relationship between the two companies. The presumption was that such evidence would support the plaintiff's contention. It would be noted that a strong case was there made by the plaintiff against the defendant on the question at issue, and

secondly it appears that the defendant had it in its power to clearly explain the true relationship between the two railroads. Failing to do this, the usual presumption was indulged.

Counsel for the Government cite at page 152 of their brief the case of *Missouri K. & T. R. Co.* v. *Elliott* (C. C. A. 8), 102 Fed. 96. The single quotation excerpted by Government Counsel does not give the real story. In that case the plaintiff, suing for damages, endeavored to show that the defendant railroad had issued conflicting orders as to the movement of the two trains which had collided, and for that purpose in due time served upon the defendant a notice to produce the train time sheet or original dispatcher's record. This the defendant declined to do, whereupon the plaintiff put in secondary evidence as to these conflicting orders. The original order book and train sheets were in the defendant's possession but beyond the jurisdiction of the trial Court. The Court, speaking through Judge Caldwell, said (at p. 102):

> "The defendant having these records in its possession, and being able to produce them, but refusing to do so after due notice, the plaintiffs had a right to introduce secondary evidence of their contents."

Further on the Court says:

> "Moreover, if there was any doubt or uncertainty as to the absolute correctness of the evidence relating to the orders of the train dispatcher and the train sheet, the defendant had it in its power to show that fact by the production of the originals. It had had notice for years, by the depositions on

file, just what the plaintiffs' evidence on the subject would be. It is a well-settled rule that when the evidence tends to prove a *material fact which imposes a liability on the party*, and he has it in his power to produce evidence *which from its very nature must overthrow the case made aaginst him*, if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary." (Italics ours.)

The Court quote the maxim of Lord Mansfield and Mr. Starkie on Evidence, and then say: "A case cannot well be imagined where this rule could have a more cogent application." There is no evidence in the case at bar tending to prove as a material fact anything which "imposes a liability" on the defendant Mammoth Oil Company, or Mr. Sinclair, nor does it appear "that he has it in his power to produce evidence which from its very nature must overthrow the case made against him"—that is, assuming that there were any case made against Mr. Sinclair or the defendant on the facts. The rule laid down by the Court in the case cited is well established in every jurisdiction but has not the slightest application to the facts in this case.

In the case of *Glaspie* v. *Keator* (C. C. A. 8), 56 Fed. 203, cited by Counsel at page 153 of their brief, there was as shown by the Court "evidence which fully warranted" the finding of fraud. That being the situation, the Court in its opinion said: "It is also worthy of notice especially in a case of this character that Glaspie was not called as a witness to refute any of the allegations

of fraud." The case, in other words, is in entire harmony with the principle of law as stated by us.

In the case of *Hansel* v. *Purnell* (C. C. A. 6), 1 Fed. (2nd) 266, cited by Counsel on page 153 of their brief, a large amount of evidence had been introduced pro and con. The Court below found a decree for the plaintiffs on their Bill in Equity. This was affirmed by the Court of Appeals in the decision cited. The words quoted in Appellee's brief were used in that connection. Needless to say, this does not conflict in any wise with the statement of the principle made by the cases cited by us.

In the case of *Attorney General* v. *Pelletier*, 240 Mass. 264, cited by Counsel on page 154 of their brief, even the quotation by Counsel shows "that there was ample evidence introduced by the informant tending to prove that the respondent was guilty of many of the charges set forth in the information. This evidence, if believed, constituted abundant proof of the malfeasance and misfeasance in office arising from motives utterly unworthy of an upright man." In such a case the defendant was silent and the Court makes the comments quoted on that silence. This does not support Counsel's contentions.

We have read all of the authorities cited by Counsel at the bottom of page 155 of their brief and in our view not one of them in any way attempts to hold that silence of a party authorizes any inference against him except in cases where liability is otherwise proven against him.

Application to the Case at Bar of the Principle as to Inference from Silence.

Counsel claim that Sinclair was called upon to speak with reference to the following matters:

> 1. The transaction spoken of as the Continental Trading Company Matter.
>
> 2. In connection with Sinclair's "visit" to Fall's home at Three Rivers and his curious appearance as the man of opportunity just prior to his offer of February 3d.
>
> 3. What they characterize as undue intimacy with Fall as revealed by what they characterize as many private conferences.
>
> 4. What they characterize the sudden acquisition of wealth by Secretary Fall.

1. *Continental Trading Company matter.*

It will not do in considering that matter to ignore the evidence as Counsel have ignored it. We have at pages 38-48 of our main brief fully set forth the facts in relation to that matter and have argued the entire Continental Trading Company transaction at pages 65-162 of our main brief. We request the Court to review what we said there confident of the conclusion that there is nothing in the entire Continental Trading Company transaction which would have required Sinclair to go on the stand. What, we ask in that transaction was laid at his door?

2. *Sinclair's "visit" to Fall's home.*

What was there, we ask, in connection with Sinclair's visit to Fall's home at Three Rivers, New Mexico, at the

end of December, 1921, that has not been fully explained. Zevely testified that he and Sinclair went to see Fall on a matter pertaining to Osage Lease matters and that while there Sinclair inquired of Fall if Teapot Dome was to be leased, that Fall replied that he was then having an investigation made and upon that report would be determined whether or not Teapot Dome would be leased (R. 323). What is there in this inquiry that called upon Sinclair to further testify in addition to what Zevely testified to in reference to this conference?

In reference to Sinclair's "curious appearance" prior to his offer of February 3d, Robison testified that Fall told him that he had sent for Sinclair and Robison further testifies that when Sinclair arrived he frankly outlined to Sinclair what he, Robison, on behalf of the Navy, would insist upon in the event a lease was executed. We submit that in the light of this explanation there was nothing Sinclair was called upon to explain.

3. *The "undue intimacy with Fall."*

In reference to the undue intimacy with Fall as revealed by their many private conferences the Record discloses the following conferences between Sinclair and Fall: at Three Rivers, New Mexico, on or about December 31, 1921 (R. 323); at Secretary Fall's office in Washington, D. C., within a few days after the conference in the latter part of January, 1922, when Admiral Robison outlined to Sinclair the propositions that the Navy would want in the event that a lease was executed on Teapot Dome, or Naval Reserve No. 3 (R. 589, 607, 612); at Secretary Fall's office in Washington, D. C., on or about

February 18, 1922, at which Ambrose was asked to prepare a draft of a lease contract (R. 339, 708); at Secretary Fall's office in Washington, D. C., on April 7, 1922, when the lease was executed (R. 340).

At all of these conferences J. W. Zevely, a witness produced by the Plaintiff, was present. At some of these conferences Robison was present in addition to Zevely; and at some of the conferences Ambrose in addition to Zevely and Robison, was present. All of these gentlemen were witnesses and their testimony is in the Record.

What took place at these conferences, what was said and done, has been testified to by either Zevely, Robison, or Ambrose and there is no hint anywhere of anything sinister having taken place at any of these conferences. They were held just as conferences mentioned in evidence were held between Mr. Finney and various persons, and as conferences must be held between the Secretary and those seeking him on account of matters that he may have in charge. Was it ever supposed that a Secretary of the Interior could not talk with anyone? Nothing beyond that is indicated by the evidence here. We submit that nothing which can be characterized as "undue intimacy" between Mr. Sinclair and Secretary Fall was shown.

4. *The sudden acquisition of wealth by Secretary Fall.*

Mr. Booth testified that Mr. Everhart on May 29, 1922, brought to the Thatcher Estate Company, Pueblo, Colorado, $140,500 face amount of Liberty Bonds; that he applied $83,000 on the indebtedness of Everhart himself to the Thatcher Estates Company; $10,000 on notes of the Tres Ritos Cattle and Land Company; $15,000 on

a note of A. B. Fall; and credited $11,523.10 to Tres Ritos Cattle and Land Company's account (R. 538).

Mr. Rule testifies that on May 29, 1922, Mr. Everhart handed to him, Rule, $90,000 par value of Liberty Bonds with a statement by Mr. Everhart at the time that the bonds were the property of A. B. Fall. They were to be kept by the First National Bank of Pueblo "for Mr. Fall's account" (R. 533). We assume that it is these transactions which Counsel have characterized "the sudden acquisition of wealth by Mr. Fall."

How counsel can conclude that Fall had nothing before, and that the transactions above suggested constituted a sudden acquisition of wealth by Mr. Fall is something we cannot understand. Likewise we fail to see how Counsel can conclude that any supposed sudden acquisition of wealth by Mr. Fall had its source in Mr. Sinclair or could be explained by him.

Government Counsel's Argument That Inferences May Be Drawn From Inferences.

At page 156 Counsel assert, "The finding of bribery as one of the elements of fraud, is sustained by the proofs, and is not based on improper inferences or presumptions." Having induced the Court of Appeals to adopt the theory stated in their brief in that court that Mr. Sinclair bribed Secretary Fall, Counsel for the Government now seek to minimize the issue of bribery by characterizing the finding of the Court of Appeals in relation to it as a "sub-conclusion". We have hereinbefore demonstrated that the finding of fraud by the Court of Appeals was solely a finding of bribery. We

are confident that that finding is not sustained by the evidence and Counsel for the Government apparently concur as they now take the position that the finding of bribery is only one of the elements of fraud. But as we have shown early in this memorandum, there is no evidence of any sort of fraud and Counsel's characterization of various matters as fraudulent are mere assertions which they did not show to be supported by any evidence that the matters to which they refer were either unlawful or injurious.

Counsel recognize the force of the argument in our principal brief that the finding of the Court of Appeals as to bribery was arrived at by drawing inferences from inferences in that they now contend that fraud may be proved by drawing inferences from inferences. They seek at pages 162 and 163 to show that the cases of *United States* v. *Ross*, 92 U. S. 281, and *Manning* v. *Insurance Co.*, 100 U. S. 693, are not authorities for the proposition that inferences may not be drawn from other inferences and they quote a line or two from the opinion of this Court in each of those cases. We will quote fully enough therefrom to show what the facts involved were.

In the *Ross* case at page 283 of 92 U. S., the matter appears fully as follows:

> "Such were the facts found; and from them the court deduced, not as a conclusion of fact, but as a presumption of law, that the thirty-one bales removed on government wagons to the warehouse immediately adjoining the railroad at Rome, shortly after May 18, 1864, were a part of the forty-two bales received at Nashville on the 24th of August, four months afterward, and there turned over to the treasury agent. It is obvious

that this presumption could have been made only by piling inference upon inference, and presumption upon presumption. Because the thirty-one bales of the claimant were taken to the warehouse alongside of the railroad at Rome in May, 1864, and the cotton in that warehouse afterwards, at some unknown time (whether before or after August 19 does not appear), was shipped on the road to Kingston, it is inferred that the claimant's cotton was part of the shipment. Because somebody's cotton (how much or how little is not shown) arrived at Kingston from Rome at some time not known, and was forwarded to Chattanooga before the 19th of August, 1864, it is inferred that the claimant's thirty-one bales, presumed to have reached Chattanooga, thus arrived and were forwarded; and, because forty-two bales were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimant's bales were among them. These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact, much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev., p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter

should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

In *Manning* v. *Insurance Co.*, 100 U. S. 693, the Court after quoting from the *Ross* case, said at page 698:

"If these principles be applied to the present case, the inadmissibility of the presumption which the defendant contends the court should have permitted the jury to draw becomes apparent. That renewal premiums to a certain amount, upon which he was entitled to commission, had been paid to the Company, was the ultimate fact which was necessary to be proved. What the evidence did prove was, that there were policies in force on the 2d of June, 1871, the annual premiums upon which were $87,000; that he would be entitled to Commissions upon renewals of the policies, if they should be thereafter renewed, and if the renewal premiums should be paid to the Company, and that these premiums were to be collected by his subagents and paid over by them. These were the primary facts. Everything more was left to presumption. The jury, therefore, were to presume that the policies did not lapse, and that they were renewed. Built on this presumption was another, namely: that the renewal premiums were paid to the agents; and upon this a further presumption,

> that the premiums had been paid over by the agents to the Company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury found upon such evidence would have been a mere guess. The evidences of fact did not go far enough. We think, therefore, the court was not in error in withdrawing it from the consideration of the jury."

As supposed to be contrary to the view expressed by this Court, Counsel cite at page 165 of their brief, the case of *Cooper* v. *United States*, 9 Fed. (2d) 216. The truth is that in that case guilt was proven by circumstantial evidence, the conclusion being drawn from circumstances proved and not from other inferences or presumptions. The case is not at all in point. The same is true of *Dimmick* v. *United States*, 135 Fed. 257, cited by counsel at page 166 of their brief.

The case of *State* v. *Fiore*, *87 N. J. L. 311*, cited by Counsel at page 168 is no authority whatever that inferences may be drawn from other inferences. The request for the charge which was refused in that case was based on a misconception of the evidence. An examination of the case shows that certain facts were definitely proved not presumed or inferred and from which legitimate inferences might be drawn and the request for the instruction was therefore rightly refused, when considered in the light of the facts proved.

In the case of *Hinshaw* v. *State*, *147 Ind. 334* cited by Counsel at page 169 the very first sentence in the syllabus brands the case as no authority against the principle for which we contend. It is there said:

> "The evidence is sufficient to exclude every other reasonable hypothesis than that of defendant's guilt of murder of his wife."

In the course of the opinion the Court in reviewing the contention of appellant's counsel that the evidence was not sufficient to exclude every other reasonable hypothesis or supposition than that of the guilt of the accused said:

> "The inherent unreasonableness of this hypothesis is so great that even human credulity revolts at it."

The Court carefully reviewed all the evidence and demonstrated that there was no rebuttable presumption from which inference detrimental to the defendant could properly have been drawn but that the inferences drawn were deduced from facts clearly proved, some it is true by circumstantial evidence but none-the-less proved without being themselves presumed. It seems to us, that Counsel for the Government are driven to desperate straits in citing the Hinshaw Case as applicable to the facts in this case.

At page 172 of their brief Counsel for the Government quote from Wigmore on Evidence, 2d Edition, Volume 1, Section 41, the first sentence of the quotation being as follows:

> "It was once suggested that 'an inference upon an inference' will not be permitted, *i. e.*, that a fact desired to be used circumstantially must itself be established by testimonial evidence; and this suggestion has been repeated by a few courts, and sometimes actually enforced."

A reference to Mr. Wigmore's work will show that he cites as examples of cases where the suggestion has been "sometimes actually enforced" the cases of *United States* v. *Ross*, 92 U. S. 281 and *Manning* v. *Insurance Company*, 100 U. S. 693, which Counsel here attempt to say are not authority for the proposition. Mr. Wigmore goes on to say:

> "There is no such rule; nor can be * * * The judicial doctrines that sanction the fallacious and improper limitation originally put forward without authority must be taken as valid only for the particular evidentiary facts therein relied upon."

We are satisfied to allow Government Counsel to rely upon the authority of Mr. Wigmore. We prefer to rest upon the sound views announced by this Court in the cases referred to by Mr. Wigmore.

The Government's Argument as to the Illegality of the Lease and Contract.

Under the heading of "The Illegality of the Lease and Contract", Counsel for the Government make a labored effort to bring this case within the scope of the decision of this Court in the Pan American case. They have so misstated and misrepresented the provisions and character of the lease here in controversy and the evidence as to what caused the making of the lease that we shall reply to each of their contentions *seriatim*.

(1) Government Counsel's analysis of the lease of April 7, 1922, and the supplemental contract of February 9, 1923 (Brief p. 173).

(a) The Lease of April 7, 1922.

Counsel for the Government set great store by the preambles contained in the instrument of April 7, 1922. They state that the purposes and objects recited in the preambles are all stated as of equal importance as moving causes in the making of the lease (Brief p. 174). As a matter of fact, the preambles do not purport to state what was the moving cause of the lease. No distinction is made in the preambles between what caused the making of the lease and what features the Government sought to obtain in the lease. As we shall hereinafter show, the moving cause in the making of the lease was threatened loss of the Navy's oil by drainage and *after* it had been determined to make a lease the Navy Department determined that it would reserve to itself in the lease various options whereby it might secure, if it later so elected, certain advantages to the Navy. Preambles of a contract are not strictly any part of the contract and they may not be considered alone in determining what the intent of the parties was in the contract. The contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument and not from any detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole.

Counsel for the Government quote from Article I of the instrument of April 7, 1922:

> "The lessor, in consideration of royalties to be paid and the covenants to be observed, as hereinafter specifically set forth, does hereby grant and lease to the lessee", etc.

Reference to the instrument itself shows the consideration to be paid by the lessee for the lease. It is double, consisting of the payment of royalties and the observance of covenants, the covenants being to furnish bond and to drill wells and develop the property in a diligent manner. This constitutes the sole consideration to be given by the lessee for the lease.

At pages 175 and 176 Counsel for the Government appear to be critical of the schedule of royalties agreed to be paid by the lessee. It is true that the royalties are upon the basis of average production per well per day for the calendar month. At the time the lease was made it was thought that such average production per well per day for a calendar month would run very high, based upon the Government's experience in the Salt Creek Field immediately adjacent and upon the assumption that certain areas of sand within the reserve, falling within certain structural contours of which the Government had adequate knowledge would contain the same amount of oil per acre as in the Salt Creek Field (R. 668). If the return to the Government in royalties has not been up to expectations, it is because the oil was not there and not because the scale of royalties in the Mammoth lease was not highly advantageous to the United States. As we pointed out in our main brief, the Mammoth royalties were considered better than those offered by the Texas Company (R. 668) and were more than

other oil men the Government's own witnesses, and the only witnesses who testified on the subject, would have been willing to pay.

At page 176 Counsel for the Government quote in heavy black type the following provision from the instrument of April 7, 1922:

> "The lessor agrees to, and does hereby, sell to the lessee, and the lessee agrees to, and does hereby, purchase from the lessor all the royalty oil hereinbefore mentioned, as and when the same is produced by the lessee, so that the lessee shall take and have title to and possession of, and the right to dispose of all oil, as and when the same is produced. In payment for said royalty oil, and in lieu of the delivery in kind to the lessor, lessee agrees to set up an oil exchange credit to lessor therefor and to issue to the lessor, as evidence thereof, oil certificates showing the amount of said royalty oil taken by the lessee and the value thereof."

They assert that this provision clearly shows that the transaction was intended to be and was in fact and in law a sale and that what arises on the delivery of the royalty oil is a debt from the lessee to the lessor. Here again we assert that this provision must be read in the light of the purposes of the contracting parties as gathered from the entire contract and must be considered in connection with other provisions of the contract. *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452, 467.

Reference to the whole contract shows that the parties intended that the Government should either get cash for

its royalty oils, in which event the transaction would be a sale, or it should get fuel oil and other oil products and if it so elected, sufficient storage facilities to conserve such fuel oil and other oil products, in exchange for its royalty oils, in which event the transaction would be not at all a sale but purely an exchange. The Government had the option as to whether the transaction should constitute a sale or exchange and the oil certificates furnished a convenient and practical way for the operation of such an option in the Government. It is absurd to assert that it is illegal for the lessee to be in debt to the lessor for the royalty oils. The lessee, of course, cannot promptly account to the lessor for each barrel of oil as it is brought out of the ground. It is universally customary in the oil industry for lessees to account to lessors periodically. No other method would be practicable. This has been recognized in the regulations of the Department of the Interior concerning oil and gas leases made under the General Leasing Act of February 25, 1920. These regulations provide that the royalty due under the leases made thereunder shall be payable on the fifteenth day of the month succeeding the month in which the oil is produced (General Land Office Circular 672, approved March 11, 1920).

Counsel for the Government find in the words on the oil certificates "being of a cash value of $," plain indication that these certificates could not be used as a medium of exchange but only as creating a debt from the United States to the lessee. The form of certificate is set forth at Record page 25. The oil certificate itself refers to the terms of the instrument of April 7, 1922, and cannot be interpreted or understood without refer-

ence to the provisions of that instrument. For example, the first option mentioned in the oil certificate which is only half quoted at page 177 of the Government's brief, is that the certificate will be redeemed:

> "(a) As a credit upon, or for the extinguishment of any obligation to the maker hereof from the United States Government by reason of the construction of steel tank storage for the use of the United States Navy in the storing of fuel oil under the agreement for the exchange of crude oil for fuel oil and storage under the contract between the United States of America, acting on this behalf by the Secretary of the Interior and the Secretary of the Navy, of the one part, and the Mammoth Oil Company of the other part, of date the ..... day of April, 1922;" (R. 25).

Referring now to the agreement (R. 26) it will be seen that the storage referred to in the oil certificate is only such as shall become necessary for the storage of such fuel oil as the United States might elect to receive in exchange for its royalty oil, accruing from this particular lease. Thus it is obvious that the option as to storage cannot be exercised independently of the option as to fuel oil. Counsel for the Government over and over again assert that the purpose of the lease to Mammoth Oil Company was to create fuel depots and to build great storage facilities but one need only read the contract to see that it contemplates no storage whatsoever beyond what is actually needed to conserve the fuel oil that the Government under other options reserved to it may elect to receive for its royalty oil from Naval Reserve No. 3. The oil certificate must have a cash value

for the purposes of the storage option inasmuch as the agreement provides that the cost of such tankage as the lessor requires the lessee to build shall be liquidated in certificates of a face amount in value equal to the cost of such tankage.

Option (b) of the oil certificate relates to the exchange for fuel oil. Reference to the agreement shows that that exchange was without reference to any cash value but was on purely a quantitative basis so that the cash value of the certificate cuts no figure where the certificate is used in exchange for fuel oil.

Option (c) in the oil certificate relates to an exchange for gasoline, kerosene, lubricating oils and other petroleum products required by the United States Navy, but the basis of the exchange is left for further agreement.

Option (d) permits the Government to redeem the oil certificates in cash, in which event, as we have pointed out, the transaction resolves itself into a sale of the royalty oils. We shall consider the Government Counsel's criticism of this option later in connection with the question of severability.

In connection with Counsel's attack on the first three options as constituting a sale, it should be remembered that the Act of June 4th authorized both sale and exchange.

It may be that where a statute gives authority to sell property of the Government with no indication in the statute of any willingness on the part of the Government to accept other property in payment or part payment, the sale must be for cash. It may also be that where a statute gives authority to exchange property of the Government with no indication in the statute that the Government is

willing to accept cash instead of property in payment, or as compensation, exchange might be limited to mere bartering of property for property. In the cases mentioned, the words *sell* and *exchange* might be held to narrow and technical lines. But what shall we say of authority to *sell* Government property which has written in the very authority a clear indication that the Government is willing to take for its property other property or cash or both? And what shall we say of authority to *exchange* property of the Government when the very statute giving the authority manifests a clear willingness that the Government shall receive property or money or both? In the case at bar, the statute uses the word *sell*, but not alone. It uses as well the word *exchange*. Therefore, it is entirely within the authority of the statute to dispose of the oil for an equivalent in any way that may be deemed within the policy of the act of June 4, 1920, whether all cash or part cash or no cash is the result. If the word *sale* is defined differently by the courts, depending on its surroundings; if in other words, by reason of its surroundings or the absence of surroundings, a sale is sometimes defined as being a disposition of property for cash only, and if in other cases a transaction is denominated a sale where property is given and received, but the property, both that given and that received, is measured by money values, then in the Special Act of June 4, with the two words *sell* and *exchange* each of these kinds of sale is necessarily included within the authority to sell. They are both necessarily within the intention of Congress, in that Congress has not restricted the sale to cash only but, on the contrary, has shown that property may be accepted as the equivalent of the oil disposed of. If the

word *sell*, in reasonable definition, trenches close upon the word *exchange* in reasonable definition, then the statute gives to the Secretary of the Navy the power to sell by any method, no matter how closely trenching upon what would otherwise be called an exchange. And likewise, when the statute authorizes an exchange, it authorizes anything which might be called an exchange, no matter how closely it trenches upon that which would be otherwise denominated a sale. The whole field is covered by the two words and is intended to be covered.

In *Howard* v. *Harris*, 90 Mass. (8 Allen), 297, 299, the Supreme Judicial Court of Massachusetts, speaking through Judge Bigelow, said:

> "In a general and popular sense, the sale of an article signifies the transfer of property from one person to another for a consideration of value, without reference to the particular mode in which the consideration is paid. It was in this sense that the legislature used the word, and not in the technical and narrow sense of a transfer for a price paid or agreed to be paid in money. *The legal distinction between a sale and an exchange is a purely* artificial one; the rules of law are the the same as applied to both transactions. Practically there is no difference between them. To make such a refinement the turning point of the interpretation of a statute, contrary to the plain intent of the legislature, would be a violation of all sound rules of construction." (Italics ours.)

In *Berger* v. *U. S. Steel Corporation*, 63 N. J. E. 809, 817, it was said:

> "Sale and exchange are used interchangeably in the law, and is a transmutation of property from

one party to another in consideration of some price or recompense in value."

See also:

Baltimore & Ohio R. R. Co. v. *Western Union Telegraph Co.*, 241 Fed. 162;
Postal Telegraph-Cable Co. v. *Tonopah & Tidewater R. R. Co.*, 248 U. S. 471;
Rockefellow v. *Merritt* (C. C. A. 8) 76 Fed. 909;
Huff v. *Hall*, 56 Mich. 456;
Steere & Ballah v. *Gingery*, 21 So. Dak. 183;
McDuffie v. *State*, 19 Ga. A. 39;
Jenkins v. *Mapes*, 53 Ohio State, 110;
Pratt v. *Wickham*, 133 Mich. 356;
Mitchel v. *Gile*, 12 N. H. 390;
Clark v. *State*, 167 Ala. 101;
Lommen v. *Danaher*, 165 Wisc. 15;
23 *Corpus Juris*, Section 38, p. 208.

We therefore deem it of no consequence as to whether the transaction should be called a sale or an exchange.

(b) The Supplemental Contract of February 9, 1923.

Counsel for the Government at page 181 of their brief state that because the supplemental agreement recites that the Government has requested Mammoth to construct the storage facilities specified in it, "it is therefore quite clear that the positive and absolute covenant of Mammoth to construct such storage facilities, appearing at R. 26, and contained in the original lease agreement, has now become effective by reason of the Govern-

ment's demand." This exemplifies Counsel's strained effort to have this Court believe that the contract of April 7, 1922, was for the construction of storage facilities. What the supplemental agreement of February 9, 1923, really makes quite clear is that the original agreement of April 7, 1922, did not contain any covenant to construct storage facilities but merely provided that if the Government elected to exchange some of its royalty oil for fuel it might also elect to exchange additional royalty oil for such storage facilities as were required to conserve the fuel oil elected to be received for the royalty oil accruing under this particular lease. In the supplemental agreement which was executed ten months after the original agreement the Government merely exercised its option to have its certificates redeemed in fuel oil and other oil products, together with storage facilities necessary for the conservation thereof. The supplemental agreement was not primarily for the building of storage facilities. It was primarily for the obtaining by the Government of fuel oil and other oil products in exchange for royalty oil accruing to it from the lease of April 7, 1922, and incidentally such storage facilities as were necessary to conserve such fuel oil and other oil products.

A short answer to Counsel's criticism of "the possibility of abuse under such a contract" (p. 182 of their brief) is found in the testimony of Admiral Gregory under whose supervision the work at Portsmouth, New Hampshire was done. He testified that the work was done in accordance with the Navy's requirements and was excellent in character; that he believed the work had been done cheaper in the method that had been adopted than could have otherwise been done and that

the Navy obtained for a million one hundred thousand dollars a plant which would have cost it a million two hundred fifty thousand dollars if built under a lump-sum contract (R. 716-17). His testimony was nowhere contradicted but was corroborated by Commander Sherman, a witness called by the Government (R. 426).

(2) The Government's contention that our construction of the lease is unwarranted.

Government Counsel's next heading is "Appellant's Unwarranted Construction of the Lease" (Brief p. 183). The matter stated under that heading has to do entirely with the question of severability and will therefore be considered by us in that connection hereinafter.

(3) The Government's contention as to the real purpose of the lease.

The next matter discussed by Counsel for the Government is "The Real Purpose of the Lease" (Brief p. 187).

Throughout their brief, counsel for the Government make labored efforts to establish that the real purpose of the lease to Mammoth Oil Company was to provide fuel depots on the Atlantic Coast and to obtain for the benefit of the United States the construction of a pipe line to serve Naval Reserve No. 3 and other territory of the United States, namely, the Salt Creek Field. They assert (page 187) that we have adopted for the first time in this court an entitely novel position with regard to the lease. They then refer to what they claim was our contention in the courts below in reference to the con-

struction of the Act of June 4th. The truth is that in the Courts below we argued the construction of the Act of June 4th, 1920, in the alternative. We contended first that Congress in the light of the knowledge which it must be presumed to have had that drainage of the Naval reserves was threatened, determined the danger of drainage itself and directed the Secretary of the Navy to develop the reserves, or, second, that Congress left the determination of that question to the Secretary of the Navy and authorized him to develop the reserves in case of threatened drainage. As we have shown at page 170 of our main brief, both lower Courts adopted our alternative construction of the Act. At the trial of the cause we showed through Admiral Robison and Dr. Bain that the cause of the lease here in controversy was drainage and that the purpose of the lease was to save the Navy's petroleum and both Courts below held under the evidence that the lease was authorized.

The decision to lease Teapot Dome was made by Secretary Denby in the latter part of January, 1922 (R. 586) subsequent to a conference between Admiral Robison, Secretary Fall, Dr. Bain and Mr. Ambrose at which Admiral Robison determined to recommend the lease because of threatened loss by drainage (R. 645). The record discloses that prior to that conference there was no thought on the part of Admiral Robison of leasing Naval Reserve No. 3 for the purpose of obtaining storage facilities on the Atlantic Coast or for a pipe line or indeed for any purpose. It will be recalled that at a conference held about October 23, 1921, Admiral Robison and Interior Department officials worked out a tentative policy in respect of the Naval Petroleum Reserves, more especi-

ally in reference to Reserves Nos. 1 and 2. As to No. 3 it was determined at that conference that the data Dr. Bain and Ambrose had seen in Denver, taken in connection with the Wegemann Report, warranted a further investigation by the Bureau of Mines (R. 663-5). Just after that conference Admiral Robison prepared for Secretary Denby's signature the so-called policy letter of October 25, 1921, and in that letter it was expressly stated "that the development of Naval Petroleum Reserve No. 3 is not to be undertaken except to protect the Government against depletion of the reserve by other parties" (R. 282, par. 9 of letter of October 25, 1921).

The record will be searched in vain for any fact indicating that the purpose thus expressed in the letter of October 25th was in any respect departed from. The whole history of the decision to lease Naval Reserve No. 3 is one of drainage. No other factor or consideration entered into it.

After Secretary Denby had decided to lease Naval Reserve No. 3 Admiral Robison communicated that decision to Secretary Fall and at the same time told Fall of the desires of the Navy in connection with the lease. Referring to the terms he desired in a lease, as set forth to Secretary Fall, Admiral Robison testified:

> "*Before I laid out those terms* I had received information at the conference from Dr. Bain and Mr. Ambrose who told me that the Wegemann report was confirmed and that there was grave danger of the property being seriously damaged by drainage and that fact as to the serious danger of damage from drainage to Reserve No. 3 moved me in this conference to decide finally that

ters covered thereby and not at all to the cause or the purpose of the lease. Not only is the testimony quoted by the Government not "the only testimony on the subject of the real underlying purpose for the making of this lease" but it is not testimony on that subject at all. We have, in our main brief, and hereinbefore in this memorandum, shown that the testimony is that the cause of the lease was drainage and the purpose of it was to save the Navy's petroleum.

We respectfully suggest to the Court that the testimony of Admiral Robison, Dr. Bain, Mr. Ambrose and Colonel Zevely, which comprises 132 pages of the Record, will fully support our position and that isolated excerpts from the Record should not be accepted as indicating the motive which induced the Secretary of the Navy to make this lease. For example, Government Counsel quote at page 20 of their brief from their cross-examination of Admiral Robison, without stating that just preceding the matter quoted occurs the following:

> "I think probably the Pan American Contract was dicussed at that time in view of the recent return of Dr. Bain from the California coast. I think Dr. Bain brought up the question of Teapot Dome. He said, in effect, in substance, that the reports from the field were that the drainage of Teapot Dome was existing and that serious drainage was dangerously probable. Ambrose echoed his remark. Secretary Fall said, 'What are you going to do about it?' And I said 'I certainly am not going to repeat the disaster that we had in California. We have got to develop Teapot Dome' " (R. 645).

(4) The Pan American Case.

Government Counsel's next heading is "The Attempt to Distinguish the Pan American Case" (Brief p. 191).

This case is clearly distinguishable from the Pan American case and we will not here repeat what we have said in our main brief in that connection but shall confine ourselves to calling the Court's attention to the errors in the statements made in the Government's brief. They say that Admiral Robison frankly stated that after he had taken care of the Pearl Harbor situation "he then turned his attention to the Atlantic Coast and considered that the Navy's needs for fuel depots on that coast could be supplied from Teapot Dome" (Brief p. 191). They cite in that connection Record pages 611 and 637, but at neither place does the record support any such assertion although Counsel in their cross-examination of the witness most adroitly attempted to develop from him something upon which they could hang their fuel depot argument. Of that Admiral Robison said at page 611 that "the only available place from which we could get a supply for the Atlantic Coast was Teapot Dome." He did not at all say that he was going to develop Teapot Dome in order to get fuel oil depots on the Atlantic Coast. He further stated at page 611 of the Record that he did not discuss the Atlantic situation with Secretary Fall prior to the interview he had with him late in January at which time he did say to him that the lease of Teapot Dome would give similar advantages on the Atlantic Coast. Before he made that statement to Secretary Fall he had determined to lease Naval Reserve No. 3 because of threatened loss by drainage. The other citation to Record page 637 merely shows, taken in con-

nection with the lease as executed, that Admiral Robison sought to obtain in the lease a right whereby the Navy might elect to receive fuel oil and storage facilities therefor in case it so desired. This also does not at all bear out the assertion that the lease of Naval Reserve No. 3 was made in order that such storage facilities might be constructed. In the Pan American case the leases there in controversy were made in order to give the Government more royalty oil to exchange for fuel oil and storage facilities. They were made in aid of the fuel depot projects. This record discloses that that was not the situation in this case.

Again at page 192 Government Counsel say:

> "Robison frankly states that this lease was made to take care of a national emergency (R. 584-86). By this he unquestionably means the provision of depots not authorized or appropriated for by Congress."

This is doubly erroneous. In the first place a "national emergency" did not cause the making of this lease. Time and again Admiral Robison testified that serious danger of drainage was what moved him to recommend the leasing of Naval Reserve No. 3 (R. 607-8; 584; 645). In the second place the "national emergency" referred to by Admiral Robison (R. 645) was clearly shown by him to be "the Japanese situation" (R. 646) and Admiral Robison nowhere says that that situation caused him to make the lease. Why indeed, would a detailed investigation of the question of drainage, such as we have shown in our main brief was made, have been necessary if Admiral Robison made this lease for any reason other than drainage?

Counsel for the Government maintain that the Secretary of the Navy exchanged Naval Petroleum Reserve No. 3 for the building of a pipe line.

In respect of the pipe line we submit first that the Government should not be permitted to litigate this question. It is a general rule in equity that the issues are those made by the pleadings and that the plaintiff may succeed only on the issues tendered by the bill. *Reed* v. *Munn* (C. C. A. 8), 148 Fed. 737; *McKinney* v. *Big Horn Basin Development Co.* (C. C. A. 8) 167 Fed. 770; *Kennedy* v. *Custer* (C. C. A. 8), 174 Fed. 972.

An inspection of the bill of complaint here discloses that the plaintiff alleged the grounds upon which it was claimed the lease and supplemental contract were illegal. The specifications of illegality are in paragraphs 15, 19, 21 and 22 (R. 6-8). The substance of these specifications of illegality is:

> (1) That the contracts were made without advertisement or competitive bidding.
>
> (2) That the negotiations for the contracts were carried on under the Executive Order and by and between Secretary Fall and the defendant.
>
> (3) That Secretary of the Navy Denby took no part in the negotiations of the contracts and exercised no discretion with regard thereto.

The defendant was never given an opportunity to litigate the question of the legality of the pipe line feature. If it had been given such an opportunity, it could have introduced abundant evidence that the pipe line constituted no part of the consideration for the lease. For that matter Counsel for the Government in taking the

testimony in this case themselves proved on cross-examination of Admiral Robison that these projects (the lease and supplemental contract and operations under them) were accomplished "*without charge to the Navy for the pipe line*" (R. 612). If it be true that the pipe line cost the Government nothing, as plaintiff itself proved on the trial, we do not see how it could have rendered the contracts unlawful.

In the courts below Counsel for the Government ridiculed the pipe line feature and expressed very great amusement inasmuch as they pointed out that the pipe line would have come in any event. However, they now think it is a most serious matter, making the entire contract of April 7, 1922, illegal.

At page 193 of their brief Counsel say that "every element denounced by this Court in the Pan American decision is present in this case. The Atlantic Coast fuel depots were admittedly parts of the one hundred three million dollar fuel depot building scheme of the Navy." The difference in the two cases is briefly this. In the Pan American case leases were made in Naval Reserve No. 1 in order that the Navy might realize therefrom sufficient royalty oil to build fuel depots. As stated by this Court, the contracts and leases there in controversy had no purpose to save petroleum. In this case the lease of Naval Reserve No. 3 was made as a conservation measure; in other words to save the Navy's oil in Naval Petroleum Reserve No. 3, and it was made solely for that purpose. If the facts as laid before Secretary Denby and his representative Admiral Robison were such as to authorize him to decide that loss of petroleum to the Navy was threatened, it was within his discretion to

reach such conclusions as might fairly be deduced from the facts laid before him.

Counsel for the Government go on to say:

> "Indeed the supplemental contract itself shows a scheme of building on that coast (the Atlantic Coast) that would run into millions upon millions of dollars for fuel depots never authorized by Congress" (Brief pp. 193-194).

The answer is, that is not so unless Naval Petroleum Reserve No. 3 would yield to the Navy in royalties multiplied millions upon millions of barrels of oil. Unfortunately Naval Reserve No. 3 will not yield any such stupendous quantities (R. 668).

(5) The Government's Charge that We Seek to Have This Court Reverse Its Holding in the Pan American Case.

Counsel's next heading is "The Attempt to Have This Court Reverse Its Holding in the Pan American Case" (Brief p. 194). We have not at all argued, as Counsel assert, that the appropriation of five hundred thousand dollars contained in the Act of June 4, 1920, is no limitation upon a fuel depot building scheme. Our contention is, and both lower Courts have found on the evidence, that the lease and contract here do not involve a fuel depot building scheme. Counsel quote from the decision in the Pan American case (Brief p. 195), but the language so quoted is to be taken in connection with that just preceding, namely, "it was the purpose of those making the contracts and leases to circumvent the laws and defeat the policy of the United States established for the conservation of the Naval Petroleum Reserves. The

purpose of the representatives of the Department was to get for the Navy fuel depots or storage facilities that had not been authorized by Congress. The leases were made to obtain the crude products for use as a substitute for money to make good the amounts advanced by petitioners to pay for such improvements." What we contend is that that language is not at all applicable to this case. The lease here was made for the purpose of conservation and only for that purpose. There was no purpose to get for the Navy fuel depots or storage facilities. The lease here was not made in aid of any such purpose but was made solely to protect Naval Reserve No. 3 against threatened loss by drainage. In this case the Secretary of the Navy took no action except such as was appropriate to conserve the Navy's oil and to carry out the policy for which the naval petroleum reserves were created.

(6) Severability.

Counsel for the Government have not attempted to answer the arguments contained in our main brief upon the question of severability. They assert that we argue only for the severability of the supplemental agreement. We do argue that the supplemental agreement is clearly severable but we go further than that and contend that not only the supplemental agreement but all of the provisions contained in the instrument of April 7th, 1922, in reference to the disposition of the royalty oils sever themselves naturally from the lease proper contained in that instrument. The lease is not as stated by Counsel bilateral but is unilateral. The Government leased to

Mammoth Oil Company the lands included in Naval Reserve No. 3. On its part the lease is executed; nothing further is to be done by the lessor. As consideration therefor the lessee is to pay stipulated percentages of the oil produced as royalties and is to proceed with diligence and in accordance with the requirements laid down by the lessor to drill wells and develop the property. When and as the lessee drills the wells as so provided and pays the royalties stipulated, the lessor receives everything which it has agreed will constitute full consideration to it for the lease.

In *United States* v. *Bradley*, 10 Pet. 343, Mr. Justice Story said:

> "That bonds and other deeds may in many cases be good in part and void for the residue, where the residue is founded in illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period. The doctrine has been maintained, and is settled law, at the present day, in all cases where the different covenants or conditions are severable, and independent of each other, and do not import *malum in se*. • • •
>
> "There is no solid distinction in cases like the one before the court, between bonds and other deeds containing conditions, covenants or grants, not *malum in se*, but illegal at the common law; and those containing conditions, covenants or grants illegal by the express prohibition of statutes. In each case the bonds or other deeds are void, as to such conditions, covenants or grants which are illegal, and are good as to all others which are illegal and unexceptionable in their purport. The only exception is when the statute

has not confined its prohibitions to the illegal conditions, covenants or grants; but has expressly or by necessary implication, avoided the whole instrument to all intents and purposes."

In *McCullough* v. *Virginia*, 172 U. S. 102, 113, 114, it is said:

> "But the promise on the part of the state, written into these coupons and authorized by the act of 1871, was a promise to pay so much money and to receive such promise in satisfaction of taxes. • • • But in the case at bar there is no illegality in the consideration. That was furnished by the bondholder in the old bond, and that bond was the sole consideration. It is nowhere suggested that there was any vice or illegality in it; that it was not a valid obligation of the State. When the bondholder surrendered that he furnished the entire consideration for the contract, and for that he received from the state a promise. And as the Supreme Court of Ohio said in the case above cited: 'When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue.' The Court of Appeals concedes that the promise made by the State to pay the interest is valid, because made upon a good and lawful consideration. Does it not logically follow that the promise of the State is also good as to all other matters contained within it in respect to which it might lawfully make a promise? It promised to receive the coupons 'for all taxes, debts, dues, and demands due the State.' That promise was necessarily for each tax and debt, as well as for all taxes and debts. If it should so happen that any single

> tax or debt cannot, under the constitution of the State, be lawfully discharged by the receipt of the coupon, there is no difficulty in separating that part of the contract from the balance. And as said by the Supreme Court of Ohio: 'Whenever the unlawful part of the contract can be separated from the rest, it will be rejected and the remainder established.' "

But even if it be held that the provisions in the instrument of April 7, 1922, relating to the disposition by the Government of its royalty oils to the lessee are not severable from the lease, clearly if any of the *alternative* methods by which the Government may have the oil certificates representing its royalty oil redeemed, are invalid, the illegal methods may be stricken out and the Government will still be able under the contract to obtain for its royalty oil what it has agreed will constitute full consideration therefor. Government Counsel assert that the whole scheme of the lease clearly indicates that the first thing to be derived by the Government is steel tank storage to be built and filled with fuel oil by the lessee (R. p. 185). If that were so, why does the contract itself provide that the Government may receive for its royalty oils either fuel oil *or* other oil products *or* cash? The parties intended what they wrote in the contract and it does not lie in the mouth of Government Counsel to assert that they intended something else. If the option as to storage tankage, limited as it is, be held invalid, it may be stricken out and the Government will still be able to receive full consideration for its royalty oils in any one or more of three ways. It may exchange all or any part of its royalty oils for fuel oil. It may exchange all or

any part of its royalty oils for Diesel oil, lubricating oil and other oil products suitable for use by the Navy, or it may take cash for all or any part of its royalty oils. Counsel for the Government refer to certain provisions in respect of the option to redeem oil certificates in cash which favor the other options in reference to notice, etc. Those provisionus are as much in favor of the options for fuel oil and other oil products as they are the option for storage tankage. Counsel persist in treating the provision requiring previous notice for redemption of oil certificates in cash as a provision in favor of the option for storage tankage but that simply is not true. It is as much in favor of the other two options mentioned. We cannot conceive that the options for fuel oil and other oil products will be held illegal but if they are so held to be illegal and the option for storage tankage is held to be illegal, leaving only the option to take cash for the royalty oils, then every provision in the contract which in any way limits the right to exercise the option to take cash, will fall with the other options in the contract in whose favor the provisions limiting the right to receive cash were intended.

The case of *New York Central and Hudson River Railroad Company* v. *Gray*, *239 U. S. 583*, seems to us to dispose of this question. In that case Gray had a contract with the New York Central by which he was to receive for certain maps $750.00, $150.00 of which was to be paid in cash, and the balance in transportation between New York City and a certain point in Pennsylvania. The cash payment was made, but it became unlawful to furnish the transportation. An action was brought *upon the contract itself* seeking to recover in

money the balance due, although by the contract that balance was not to be paid except in transportation. This Court sustained the action on the contract and the plaintiff recovered in money the amount which had been promised to be paid in transportation. The Court held that the Railroad Company was right in refusing to furnish the transportation, and proceeded: "But from this, it by no means follows that it could refuse to make compensations in money for the unpaid balance of the purchase price of the map. * * * But there is nothing in the act to prevent or relieve a carrier from paying in money for something of value which it had long before received under a contract valid when made, even though the contract provided for payment in transportation which the passage of the act rendered thereafter illegal."

The case at bar is even stronger than the Gray case, in that it provided for payment in money if the Government should so elect. It provided alternative payments should the Government elect these alternatives. If an alternative could not be elected because unlawful, then under the Gray case, the agreement required lawful payment.

In the Gray case, the contract itself did not on its face allow Gray at any time to elect cash. Yet the court swept out the alternative and, by that, gave Gray the right to call for cash, not as a *quantum meruit*, but on the contract itself.

The cases cited by Counsel for the Government do not at all answer the questions which we have raised in our main brief and here.

In the case of *Hazelton* v. *Scheckells*, *202 U. S. 71*, cited by Counsel at page 198 of their brief, the considera-

tion was not in the alternative but was two matters joined, namely, services rendered in getting a bill through Congress and the money—$9,000. There was no separation. There was no way by which the entire consideration could be paid without including the illegal part.

In the case of *McMullen* v. *Hoffman, 174 U. S. 639*, cited by Counsel at page 199 of their brief, the question involved was not the consideration for the agreement; it was an agreement illegal on its face and involving the whole matter. There was a larger agreement by which plaintiff and defendant were to put in bids to the city known to each other, that fictitious bids should be put in without expectation or purpose of having them taken, and that if the contracts were procured the two companies would perform the work as partners. The whole was held to be fraudulent as against the city and the single smaller agreement of sharing between the co partners, the two operating companies, was held to be only a part of it, and the larger contract, being illegal and being that upon which the smaller contract entirely rested, made void the smaller contract.

In the case of *Langle* v. *Snyder, 160 Fed. 627*, cited by Counsel at page 201 of their brief, the rental moneys stipulated to be paid were agreed to be paid for the use of a pasture and the stipulations were of such character that the Court construed them as requiring the lessee of the premises to maintain fences enclosing them. This required the violation of a federal statute against enclosing public lands. There was nothing in the rental charge which apportioned a part to the lands that might lawfully be leased but it was a single rental for all the lands.

In the case of *Western Indemnity Co.* v. *Crafts, 240 Fed. 1*, cited by Counsel at page 201 of their brief, the particular contract was an essential step in a design to induce the Treasurer of the State of Ohio to deposit moneys feloniously in a certain bank. It is needless to say that the Court would not enforce any such step or any contract constituting part of such step.

The case of *Townes* v. *Townes, 270 Fed. 744*, cited by Counsel at page 201 of their brief, deals with a co-partnership agreement containing several elements. By one part of the agreement Robert Townes agreed to sell to Charles a certain plantation which Charles was to manage for the benefit of the co-partnership for a period of five years. Charles died before performance. The action was brought by Robert against the heirs of Charles for the cancellation of the contract to sell the plantation. The Court held that the death of Charles dissolved the partnership and thereby ended the contract. At page 749 the Court say:

> "The party thereto who was to contribute his personal skill and peculiar knowledge of the property to its management, and to whom this credit was to be extended, died intestate. We cannot but think that the contract for the management of the place until June 15, 1922, and to then execute a deed, is an entire one, and that the death of Charles rendered impossible the carrying out of an essential part of the contract by which this agreement to sell in the future was made, and releases Robert, from the obligation to sell."

In *Central Railroad of New Jersey* v. *United States Pipe Line Company*, 290 Fed. 983, cited by Counsel at

page 201 of their brief, there was an agreement by the Railroad Company to grant the defendant a right of way for a pipe line. That portion of the agreement is not further involved in the case because the pipe line was never constructed and no action with reference to its construction seems to have been brought. What was left then was an agreement by which the Railroad Company agreed to carry oil to tidewater for a fixed toll. The defendant agreed, *first*, to pay the tolls on oil shipped, *second*, to ship not less than a stipulated quantity; *third*, to pay on shipments not made 40% of agreed tolls.

The agreed tolls violated the statute. These agreed tolls constituted the whole of the contract upon which suit was brought, and being unlawful the whole contract failed for illegality.

In the case of *Linebarger* v. *Devine*, 47 Nev. 67, cited by Counsel at page 201 of their brief, the Court adopts the same principle and in addition uses this language:

> "Whether a contract is entire or separable into distinct and independent contracts is a question of the intention of the parties to be *ascertained from the language employed and the subject matter of the contract.*" (Italics ours.)

In the case of *Orenstein* v. *Kahn*, 13 Del. ch. 376, cited by Counsel at page 201 of their brief, the evidence disclosed that the different items, three in number, and the purchase, were in fact all bound up in a single matter of operating a particular store. The Court therefore found that "the agreement to convey the store, goods and fixtures in said store property was inseparably connected with the agreement to convey the business loca-

tion," and upon this found the contract inseparable and denied the specific performance.

In the case of *LaFrance* v. *Cullen*, 196 Mich. 726, cited in plaintiff's brief at page 201, it was submitted to the jury whether a certain lottery agreement was part of the contract of conditional sale involved. The jury found that it was and therefore the consideration was there void, being unlawful.

Williston on Sales, Vol. 2, Sec. 681, is cited by Counsel. A very pertinent part of the section cited is this: "Even though there are several considerations, some of which are legal, if the legal considerations are not apportioned to corresponding promises the promises are unenforceable."

Williston does not at that place say that if the legal considerations are so apportioned the contract will be enforceable, but he does say that in his work on Contracts, Section 1781, cited *supra*.

The statement made in *13 Corpus Juris, Sec. 471*, cited by Counsel is so clearly stated by that work that we need not discuss it. It is not contrary to our contentions.

(7) The Government's Argument as to the Pioneer and Belgo Claims.

On page 201 of their brief Counsel for the Government enter upon the discussion of a topic which they state in this form:

> "The making of the acquirement of the placer mining claims a part of the consideration was unlawful and voids the whole lease."

In their discussion of this matter Counsel misstate the provisions of the Act of June 4, 1920. They say at page 205:

> "The Act expressly attaches only to territory whereon no placer mining claims exist."

A very cursory reading of the Act of June 4th will show that this is not true. The lands excluded from the jurisdiction of the Secretary of the Navy are first, those on which applications for lease or permit under the Act of February 25, 1920 were pending; second, the lands on which applications for patent were pending. Lands in the naval petroleum reserves not embraced within either of these exceptions are committed to the jurisdiction of the Secretary of the Navy but, in the case here, as shown by the Morgan Report (R. 293-4) and otherwise shown in this record, the Pioneer Oil Company, successor to Societe Belgo Americaine des Petroles du Wyoming, was in possession of the lands. Mr. Morgan states that heavy expenditures were made each year in prosecuting the work ($6,000 expended each year) and further states that there is no doubt but what they will claim the right to the land and resist any attempt to deprive them of it. It is therefore a situation in which the Government did not have unclouded title and right to the lands. The Government was not in possession. Those in possession were claiming rights. Mr. Morgan recommended suit by the Government to quiet the titles. There was no way except by such a suit, for the Government to quiet these titles. Applications for patent had not been made and were not required to be made. The possessors of these claims might retain their possession and without

applications for patent continue in possession and extract all the oil.

Moreover, the Act of February 25, 1920, Section 37, recognized the rights of possessors and provided not only that that Act of February 25th should not take away the rights of such claimants but expressly preserved to the holders thereof "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, *including discovery.*"

Now, it is true, as Assistant Secretary Finney states, that the discoveries so far as known to the Department, were not such as they recognized as discoveries. It is true likewise that a somewhat different rule was in force in many, perhaps all of the courts. In the courts, the rule was and is that a discovery is only the finding of such oil as will lead a prudent man, not necessarily a miner, to proceed in the hope of finding oil in commercial quantities. The rule in the Department as we understand it, is that on applications for patent the discovery must be of oil in commercial quantities. Whichever rule be applied however, with the statute authorizing the claimant to perfect his claim, "including discovery," the question whether or not discovery had been made prior to the Act of February 25th becomes of no importance. The Government then with its clouded title could not say definitely to the Mammoth Oil Company or to any other applicant for a lease that it could insure to the applicant the right to possession or the right to the oil, nor could it insure that when oil was discovered in commercial quantities by a lessee, if such discovery should be made, either itself—the Government—or the lessee

would be able to retain the lands or the oil as against these occupying claimants.

In this situation the Government contracted with the Mammoth Oil Company for that which it had and nothing more, namely, it agreed that the Mammoth Oil Company should take the lands as they were with the rights of the Government and occupying claimants as they were, but as to such occupying claimants, in order that the Government might not be defeated of all right in the premises, it required that the lessee at his own expense should in some way remove the cloud. And it will be observed that the bill of complaint here makes no claim that the acquisition of these claims in any way reduced the royalty that the Government should receive nor operated in any way as a fraud upon the Government or as any part of the consideration of the lease contract; nor is there anything in the evidence indicating that it was any part of such consideration. The claim in the bill is only that this acquisition was fraudulent in that the requirement was secretly notified to the Mammoth Oil Company and thereby preferential opportunity was afforded it to obtain the lease. The evidence clearly refutes the allegations of the bill so made.

(8) The Government's Argument as to Competitive Bidding.

At page 206 of their brief, Government Counsel argue that the award of the lease and contract was unlawful because without advertisement and competitive bidding and they cite Revised Statutes, Section 3709. Section 3709 obviously does not apply to leases made by the Government nor to the disposition of anything made by the

Government. Indeed there is no general statute of the United States requiring competitive bidding in the sale or other disposition of the Government's property. The very keynote of the Act of June 4, 1920, is discretion. The Secretary of the Navy is given discretion in the disposition of the Government's royalty oil. If he elects to sell the oil, there is no limitation prescribed by the Act as to the price or as to the terms of payment and there is no requirement in the Act or in any general statute that he shall sell by competitive bidding. What then shall be said if he elects to exchange the royalty oil or sell it for something other than money? As we have said, there is no limitation in any statute on the *disposition* end of the exchange. In determining the valuation of the oil to be given in exchange he is not required by statute to follow any particular method. He is limited only within the boundaries of reasonable discretion. If then there is no limitation on the *disposition* end of the exchange transaction, it would be incongruous to have, in the operation of the same statute, limitations on the acquisition end. We submit that Section 3709 can have no application and cannot be applied so as to constitute a limitation upon the discretion of the Secretary of the Navy conferred by the Act of June 4th which Congress did not see fit to impose in that Act itself.

(9) The Government's Argument as to Fuel Depots.

At pages 209-212 Counsel for the Government conclude their brief as to the Mammoth Oil Company by again asserting that the lease and contract contemplated the erection of fuel depots not authorized by Congress

and they cite several passages from the cross-examination of Admiral Robison where they were able by the phraseology of their questions, to put the words "fuel depots" into the mouth of Admiral Robison for the purposes of this record. A reading of the whole testimony of Admiral Robison will show that he meant nothing more than this: That having determined that Naval Reserve No. 3 should be leased because of threatened loss of the Navy's oil by drainage—we repeat, *after* the decision to lease the reserve had been made—he determined that there should be reserved in the lease contract the right in the Government to elect to exchange the royalty oils accruing to it under the lease for fuel oil together with the necessary containers therefor in order to have an above ground reserve in aid of the Navy's national defense plans. Subsequently the Navy Department did so elect to exchange the royalty crude oils accruing from the lease and the supplemental agreement of February 9th, 1923, resulted. Government Counsel may assert the contrary time and time again but they cannot distort the record to support their assertion that the lease of Naval Reserve No. 3 was made in order to realize the Navy's National Defense Plans rather than as a conservation measure. Detached portions of Admiral Robison's testimony cannot speak louder upon this question than does the contract of April 7th itself. That contract which was primarily a lease and secondarily an agreement relating to the disposition of the Government's royalty oil, does not provide for the construction of any storage facilities whatsoever. In connection with the Government's disposition of its royalty oils the contract of April 7th provided that the Government might elect to exchange its

royalty oils for fuel oils and in connection with that right it might further elect to require the lessee to construct such storage tankage as should become necessary or be required for the storage of such fuel oil as the Government elected to receive. But the point we desire to emphasize is that in the contract of April 7, 1922, the Government did not elect to have any storage constructed but merely reserved the right to elect to require the lessee to construct storage. If the parties intended anything further than that, why didn't they put it in the contract? We repeat that Government Counsel cannot by mere assertion, change either the language or intent or character of the contract of April 7th. Note further that if the Government elects to have any storage tankage constructed the contract of April 7th provides that said storage is to be located at points designated by the lessor (R. 26). We respectfully submit that if the supplemental agreement of February 9, 1923, be held to be illegal in that it included an exchange of royalty oils for storage facilities, even as limited in said contract, and that if the option as to storage facilities contained in the contract of April 7, 1922, pursuant to which the supplemental agreement of February 9, 1923, was made, be held illegal, then the option contained in the contract of April 7th may be stricken out and the supplemental agreement of February 9, 1923, may be cancelled, leaving the lease and the other options in respect of the royalty oils to stand. In that event, the Government will still receive as consideration for the lease the stipulated percentages of royalty oils which it agreed would constitute full consideration for said lease and it may still receive for its royalty oils either fuel oil or other oil products or cash

and no matter which it chooses, whether it chooses one of the three, two of the three or all of the three, it will still receive that which in the contract of April 7, 1922, it solemnly agreed would constitute full consideration for such royalty oils.

We respectfully urge that if an illegal option was included in the contract of April 7, 1922, for the Government's benefit, then it is not equitable to permit the Government to take the position that because such option is illegal it has a right to avoid the whole contract where there are alternative and therefore severable options which are entirely legal and valid.

Examples of Erroneous Statements of the Evidence Contained in Appellee's Brief.

(References are to pages of Appellee's Brief.)

Page 6. Appellants do not limit the issue of fact under the charge of fraud and conspiracy made in the bill to the question whether the lease was made for an inadequate and improper consideration. That limitation was placed there by the appellee's Counsel who drafted the bill. An examination of the bill will show that there is no allegation of fraud other than that the lease was granted upon an improper and inadequate consideration.

That the case went off in the Court of Appeals solely on an issue of bribery is apparent from a reading of that Court's opinion. All the incidents referred to by the appellee were taken by the Court of Appeals to satisfy it of Sinclair's connection with the Continental Trading Company and the acquisition of Liberty Bonds by Everhart and Fall—in other words, bribery.

Pages 12 to 23. Here an effort is made to foreclose a discussion of the legal issues present in this case by an assertion that those legal issues have been decided by the Pan American Case. The Record facts in this case show that no lease would have been made had there not been an honest fear that damage would result to the reserve by reason of drainage. No minimizing of the testimony of Bain, Ambrose and Robison can lessen the conviction that these men against whom no charge of fraud or suspicion is made, honestly believed that the oil in Naval Reserve No. 3 was being endangered by drainage by virtue of the operations then and that were to be carried on in the Salt Creek Field. The testimony shows (R. 663) that Bain and Ambrose advised that mere strip leasing would not protect the reserve. It was not their function to determine what kind of a lease should be made or in fact, how much of the land should be leased, that was an administrative question to be determined by the Secretary of the Navy. There is no evidence in this Record that the Secretary of the Navy acted otherwise than by honest motives fully believing that the advice he had as to drainage justified him in deciding that the reserve should be leased and in that way protected. Robison testified that before he outlined the terms of the lease, he had received information at the conference with Bain and Ambrose who told him that the Wegemann Report was confirmed, that there was grave danger of the property being seriously damaged by drainage and that fact as to the serious danger of damage moved him in this conference to decide finally that they would lease the whole reserve (R. 607-8). Having decided to lease the reserve because of threatened damage by virtue of

drainage the motive is not impaired because in the negotiations for a lease certain provisions were insisted upon that would be of advantage to the Government, but without cost to the Government.

Page 22. Appellee suggests that it was not until the full scheme of development of the reserve was suggested that the fears of drainage became acute. This is in harmony with the manner in which Government Counsel seek to give an incorrect view of the evidence by stating facts in other than their actual sequence. The Record is clear and convincing that no thought of developing the entire reserve was suggested until Robison and Denby were advised by Bain and Ambrose that the reserve would be endangered by drainage by virtue of operations in the Salt Creek Field. Not until Denby and Robison were convinced of that danger was any suggestion made of the manner of development, terms of the lease, or how it should be accomplished. There is absolutely no basis in the Record for the statement made by the Court of Appeals and quoted by Counsel at page 22. Robison testified (R. 629), that "prior to this day late in January (1922) Secretary Fall had said to me he didn't think that the leasing of this reserve could be done and should be done." That the determination to lease was made subsequent to the advice about drainage and not before is further apparent from Robison's testimony in reference to the conference in January, 1922: "I think Dr. Bain brought up the question of Teapot Dome. He said, in effect, in substance, that the reports from the field were that the drainage of Teapot Dome was existing and that serious drainage was dangerously probable. Ambrose

echoed his remark. Secretary Fall said, 'What are you going to do about it?' and I said 'I certainly am not go-going to repeat the disaster we had in California. We have got to develop Teapot Dome' " (R. 645).

Pages 27-28. Under the heading on page 27 appellee's brief entitled "Secretary Fall Takes Full Charge and Control of Naval Petroleum Reserve Matters", counsel seek and sought in the Court of Appeals to impress the truth of this statement by reference to a letter written by Secretary Fall to E. L. Doheny dated July 8, 1921. Once and for all let it be understood that this letter had no reference whatever to anything that was done or contemplated to be done in reference to Naval Reserve No. 3. The Record (277,313) shows that the subject matter of the letter had reference to some friction or discord that arose between the Secretary of the Interior and several subordinates in the Navy Department in reference to controversy with the Midway Oil Company and the Pan American Company relating to rights under certain placer mining claims in one of the California reserves. The determination of this controversy was solely within the power of the Secretary of the Interior under the Act of February 25th, 1920. Notwithstanding, it is seized upon here by Government Counsel and put in a false light for the purpose of showing an attitude on behalf of Fall that this Record fails to show he ever assumed.

Furthermore, on page 28 Government Counsel quote paragraph 7 of the letter of October 25th written by Secretary Denby to Fall in which he says:

> "7. That all leases and contracts except as provided in paragraph 6 would be arranged and

consummated by the Interior Department, copies of same being furnished to the Navy Department as a matter of information and record only."

Government Counsel are careful not to quote the testimony of Robison in reference to the intent and meaning of this paragraph. The Record shows (617) that Robison drafted this letter and what was intended was that leases and contracts in reference to the lands within the Naval Reserves that were under the exclusive jurisdiction of the Secretary of the Interior should be administered solely by the Secretary of the Interior under the Act of Feb. 20, 1920 (R. 575-6), and this for the reason that there had been some conflict between the Navy and Interior Departments in reference to the nature of settlements made with the claimants of placer mining claims within the reserves.

Page 31. Every effort is made here to minimize the testimony of Bain and Ambrose in reference to drainage and to make it appear that Robison investigated the possibility of drainage after he had been advised by Bain and Ambrose. This is not correct. Robison did not purport to make any independent investigation of drainage so far as this Record shows after he had been advised by Bain and Ambrose. He relied upon their advice as he had a perfect right to do and we submit that the advice they gave at the conference in January, 1922, warranted any prudent executive in taking steps to prevent loss of oil by virtue of the drainage that would inure through operations in adjacent fields.

At page 32 Counsel say Sinclair and Zevely arrived at Three Rivers, New Mexico, to consult Fall about a

business matter, that they took advantage of the occasion to discuss the leasing of the reserve. This leaves a false impression. The business mission that took Zevely and Sinclair to New Mexico was in reference to Osage leases (in Oklahoma) (R. 323), and there was no real discussion about Teapot Dome except an inquiry by Sinclair of Fall if the Teapot Dome was to be leased (R. 323).

Page 35. Counsel seek to belittle the advice that Bain and Ambrose gave to Robison on the question of drainage at the conference which took place in January, 1922. As it was this advice that actuated the Navy Department to lease the reserve we earnestly invite the Court's attention to the testimony of Bain (R. 663-6, 693-4); Ambrose (R. 707); Robison (R. 575, 583-4, 605, 607, 645-6); in reference to this important conference.

Page 37. Counsel for the Government seek to leave the impression that Ambrose in his written report of February 18th on the question of drainage covered all the details in the information that he gave at the conference in January. This is not correct. Ambrose testified "The report is the very brief factor—the conclusions regarding drainage. It does not amplify, in any way, the question of gas pressure, water levels, structure contours, thickness of sand, depletion of production, depletion of gas, active work on the nearby leases in the southern end of Salt Creek and those other factors upon which you must base your conclusions for the report on the subject of drainage and those factors were, I believe, discussed in Secretary Fall's office" (R. 709).

At page 38 Counsel seek to give the impression that Robison in outlining to Sinclair what the Navy would in-

sist upon in a lease negatived our contention that the motive for the lease was conservation or drainage. This is not true. Robison testified "he told me to set forth to Mr. Sinclair in as much detail as possible, what we would need. There had been no discussion theretofore of what we would need except between Secretary Fall and me on the date of the conference late in the month of January when I told Fall that I would not consider any lease unless it included a pipe line. I came ultimately to that conclusion at that conference late in January when we were all of us talking and giving or exchanging information. I then set forth my ideas and told Fall that they depend upon the approval by the Secretary of the Navy. Before I laid out those terms I had received information at the conference from Dr. Bain and Mr. Ambrose who told me that the Wegemann report was confirmed and that there was grave danger of the property being seriously damaged by drainage and that fact as to the serious danger of drainage from drainage to Reserve No. 3 moved me in this conference to decide finally that we would lease the whole reserve—that in connection with our experience with other reserves (R. 607-8).

Page 39. There is absolutely no basis in the Record for the statement that Sinclair must have discussed the Pioneer claim with Fall or that Fall's statement must have been the genesis of his, Sinclair's proposition.

Page 40. Ambrose's memorandum did not negative the necessity for making a lease. In fact both Bain and Ambrose recommended that leasing should be done to protect the property (R. 666).

At page 48 Government Counsel seek to give the impression that Beaty's proposition was as good as Sin-

clair's. Bain testified: "It was Ambrose's judgment and mine that the Sinclair royalties would bring in more royalty to the Government because they were higher royalties on everything above 100 barrels and at that time we were very confident of getting larger wells there" (R. 668).

At page 50 Government Counsel seek to give a false impression by stating that Robison expressed the view that the Texas Company had no chance to compete. Robison explained this remark at (R. 653) and said "that if the Texas Company had them put in a proposition which was superior to the one we had gotten from Sinclair it would have been accepted but there was not much chance of any such thing being done. By that expression I meant we felt at that time that we had made some pretty good terms and incorporated them into the tentative contract with the Sinclairs, terms that gave us better than normal royalties, that gave us some rather extraordinary facilities and that involved the necessity of utilizing, in an indirect way, it is true, the entire Sinclair organization, marketing, etc., and I did not think that better terms would be arranged."

Pages 50-52. In discussing the testimony of Hirsh Helms, Counsel cautiously avoid or omit to show that there was confusion in the minds of Helms and Fall as to what Helms was seeking, Fall believing that Helms had in mind the purchase of the royalty crude oil in Salt Creek (R. 387).

At page 57 Counsel eager to show that it was decided between March 1-10 that Sinclair should have the lease referred to Robison's testimony (R. 614). Robison testified (R. 614-5): "It is my recollection that Secretary

Fall and I determined that Sinclair should have a lease when we found out that his was the best offer that we could get and that was somewhere in the early part of March between the first and the tenth." That he was mistaken in the date is apparent from his testimony (R. 652-3), wherein he said "It was finally determined that the offer of Sinclair would be accepted after we got that telegram from Beaty (April 5) that indicated that he was not going to give us what we wanted."

Page 62. The mere fact that operations under the lease were not commenced for 180 days is no indication that the parties did not believe that drainage was taking place or imminent. Such a development as contemplated could hardly be undertaken in any less time, roads had to be built, water wells drilled, camps constructed, etc., all preliminary to active drilling operations and this at a site approximately 40 miles from the nearest railroad. Nor does the fact that 20 test wells were to be drilled in various parts of the reserve indicate that the parties did not believe that drainage would take place. In order to properly conserve the property, using the word "conserve" in the sense of preventing drainage, it was necessary to locate by drilling the extent of the water levels, the extent of the gas area and the extent of the oil bearing sands. This could not be done merely by concentrating the 20 test wells to be drilled in the northern part of the field. In order to properly protect against drainage it was more essential to locate where the gas was that was forcing the oil through the sands than it was to drill numerous wells in the northern part of the field. The test wells merely defined the property and by equal-

izing the gas pressure would prevent the forcing of the oil out of the reserve. The drilling of all the test wells in the north end of the field would be equivalent to strip leasing or merely the drilling of off-set wells. Bain and Ambrose advised Robison in a conference in January that strip leasing would be no protection against drainage (R. 663).

Page 65. Counsel say Robison gave no weight to the recommendation of the Heald Report "that no further leasing should be done in Reserve No. 3." Heald made no such report. He said that no further leasing should be done and it was manifest from his report that he meant that no further leasing should be done on lands adjacent to the reserve, for he was there and then speaking about wells that would be drilled in the lands that had been leased in the southern part of the Salt Creek Feld and adjacent to the northern part of the reserve (R. 318). They quote Tallman as a geologist when the testimony shows he was not a geologist but an Assistant Attorney in the office of the Solicitor of the Interior Department (R. 333). His expression of opinion from a geological or operating point of view is therefore not entitled to weight. Emphasis is laid on the fact that neither Ambrose nor Bain or the Bureau of Mines were requested to recommend the quantum, the order or character of leasing to be done in Teapot Dome. This, of course, was an administrative question clearly outside their duties although they did insist that some leasing should be done if the reserves were to be protected, but they did recommend that there was danger of drainage (Bain, R. 663-6, 693-4; Ambrose, 707).

Page 68. Ambrose did not say, as quoted by Government Counsel, that his early report did not differ from his written report of February 18th, 1922. At R. 709 he shows how his written report did not amplify the many things that were discussed in the early conference.

Page 68. Robison did not testify as quoted in substance by Government Counsel that he decided not to investigate because of the existence of a national emergency but he merely stated that he did not take the time to examine the question of drainage as he might have done had there been no emergency in the matter. Appellants did not seek, as Government Counsel contend, to give the impression, that the data compiled by Bain in March, 1922, was given in that identical form to Fall and Robison in January, 1922, but the Record shows that the facts that Bain and Ambrose gave to Robison and Fall in January, 1922, were the essentials of what was incorporated in Bain's memorandum of March, 1922.

Page 69. It is stated that Fall, notwithstanding that he had reports of Heald, Tallman and Ambrose determined to lease the reserve. This is incorrect. Fall never determined to lease the reserve and the Record is destitute of any proof of that fact. On the contrary, it does show (R. 645), that after Ambrose and Bain had advised Fall and Robison of the danger of drainage, Fall said to Robison "What are you going to do about it" and Robison then said, in substance: I am not going to let Naval Reserve No. 3 be lost in the manner in which the California reserves were lost, we will have to lease. So it was Robison acting for Denby, and Denby, after Robison had advised him of the facts, determined to lease and not Fall.

Page 71. Counsel for the Government charge us with ignoring what they claim to be a fact that if the oil was drained out of Teapot Dome into the Salt Creek Field the Government would have received higher royalties under the existing Government leases in the Salt Creek Field. Even assuming this to be true, the Navy would receive no benefit from such royalty.

Page 74. There is no foundation in the Record for the statement that the acquisition of the Pioneer claims by Sinclair was entirely a matter of private negotiation between Fall and Sinclair.

Page 75. Neither Fall nor the Government gave one cent for the Pioneer claims. The consideration was paid by Sinclair and cost the Government nothing.

Page 80. A good deal of stress is laid upon the fact that Fall locked the lease in the drawer of his desk and gave the key to Stafford, his Administrative Assistant with instructions not to make the lease public. Manifestly what Fall locked in his desk were duplicate copies of the lease because on the day that he is supposed to have locked the lease in his desk the Record shows that he sent a triplicate copy to Denby (R. 286, 287).

Pages 90 and 91. Counsel seek to give the impression that the two letters referred to on those pages of their brief were signed by Secretary Fall. The letter on Page 90 is dated March 9th, 1922, and signed by Finney and there is no evidence that he wrote the letter at Fall's request (R. 412-13). The letter set out at page 91 is likewise signed by Finney and dated November 28th, 1921 (R. 409).

Page 93. Whether there was any need from a military standpoint for secrecy is beside the question. The testimony shows that matters from the Navy were generally secret and that was the only reason for treating the matter as confidential (R. 341).

Under the title "Wilful Disregard of Competent Legal Advice" Counsel seek to give the impression that attorneys for other oil companies passed upon the legality of the lease here in question. This is not true. There is no testimony whatever that the attorneys for the oil companies to whom was submitted the Pan American contract ever purported to give an opinion as to the validity of the Mammoth lease.

Page 97. Counsel state that July 8th, 1921, Fall was boldly proclaiming that he would handle matters pertaining to Naval Petroleum Reserves exactly as he thought best. This statement is based upon Fall's letter to Doheny of July 8th, 1921, which, we repeat, had no reference whatever to Naval Reserve No. 3.

Page 99. There is no evidence whatever in the Record that Fall and Sinclair privately conferred about Sinclair's proposition of February 3d, 1922, or that they conferred in any way about it.

Page 100. Again counsel refer to the fact that Fall locked the lease in his desk on April 13th and that he felt it necessary to write Denby a memorandum as to the terms of the lease as showing Fall's dominance in the negotiations. We have already adverted to the fact that

the most he could have locked in his desk were the copies thereof that were intended for his Department as he had theretofore on April 12th forwarded a copy of the lease to Denby.

Page 101. The Court of Appeals found that the lease in issue was a contract of the Secretary of the Navy. Whatever negotiations Fall conducted were but the acts of a subordinate; the execution of the contract was the vital thing and no contract came into existence until signed by Denby. Whatever Fall's wishes may have been he could not have accomplished any end he had in view irrespective of the wishes of anyone else as stated by Government Counsel. All his wishes, if any he had, other than to make a good lease for the Navy, could have been smashed and thrown out if it had not been the wish of Denby to have for the Government the contract that was executed. The Record shows that Denby went over the contract paragraph by paragraph and only signed it after he felt that it was a good contract for the Government. How then can Government Counsel say that Fall accomplished his wishes irrespective of the wishes of anyone else?

Pages 102-3. No assertion by Government Counsel that Denby was merely submissive to the wishes of Fall can change the fact that two Courts have found that Denby retained and exercised through Robison, his subordinate, sufficient control to make these contracts his contracts. His submissiveness was not expressed in the policy letter of October 25th as contended for by Counsel for as we have already explained, the paragraph of

that letter referred to by Government Counsel, had reference to leases and contracts exclusively within the jurisdiction of the Interior Department. The fact that Robison acted for Denby, prepared letters for him, that Denby did not attend any conference, that his subordinate in the matter Fall sent him a memorandum of the contract points to nothing except the desire of the Government Counsel to seize upon nothings. For it is well known that all executives must act through subordinates in the discharge of the details of their office.

Page 106. Counsel contend that Denby was deceived as to the necessity for the lease from the standpoint of drainage and as to the method of negotiation. By whom, may it be asked, was he deceived? It is not charged in the bill, much less proved as a fact, and not even intimated in the brief of the Government, that Bain and Ambrose, who advised Robison of the danger of drainage were not actuated by an honest motive, that they were not competent or that their advice was the result of intimidation. Certain it is that the Record does not show that Fall advised Denby as to drainage other than he asked the officials in the Bureau of Mines to report to Robison the results of their investigation as to drainage and as to the method of negotiation. There is no evidence in the Record whatever that Denby was deceived by the method of negotiation. On the contrary, the evidence shows that Denby relying upon Robison was kept in close touch with negotiations day to day by Robi-

son. Robison was in constant touch with Fall and Robison does not testify that he was deceived in any way by negotiations by Fall, Sinclair or anyone else.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 719.

MAMMOTH OIL COMPANY, SINCLAIR CRUDE OIL PURCHASING COMPANY and SINCLAIR PIPE LINE COMPANY, Petitioners,

vs.

THE UNITED STATES OF AMERICA, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

SEPARATE BRIEF ON THE MERITS ON BEHALF OF PETITIONER MAMMOTH OIL COMPANY.

Official Reports of the Opinions Below.

The Opinion of the District Court of the United States for the District of Wyoming herein, is reported in 5 Fed. (2d) 330-354. See also R. 226-271.

The Opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 14 Fed. (2d) 705-733. See also R. 794-851.

The Jurisdiction.

Through the granting of a joint and several petition for certiorari to the United States Circuit Court of Appeals for the Eighth Circuit prayed by the Mammoth Oil Company, the Sinclair Crude Oil Purchasing Company and the Sinclair Pipe Line Company, this cause is here for decision on the merits under paragraph (a) of Section 240 of the Judicial Code (U. S. Code Sec. 347). The decree of the court below was entered October 12, 1926 (R. 852).

STATEMENT OF THE CASE.

The suit is in equity begun in the United States District Court for the District of Wyoming on March 13, 1924, against Mammoth Oil Company and others by the United States of America. As concerns Mammoth Oil Company, the object and prayer of the bill is to cancel (with resulting accounting) certain contracts, as follows:

The primary and basic contract involved is a lease dated April 7, 1922, whereby the United States leased to Mammoth Oil Company Naval Petroleum Reserve No. 3 in Wyoming in consideration of the lessee's promise to develop the lands and to pay to the lessor royalties in the form of stipulated percentages of the oil produced.

In the instrument dated April 7, 1922, there is a collateral agreement relating to the disposition by the Gov-

ernment of the royalty oils accruing to it under the lease. That agreement permits the lessor to choose as to the equivalents to be received by way of compensation but leaves the amount of the compensation fixed and determined.

As indicated above, the medium in which the compensation is to be paid, is left to the option of the lessor—the Government. The lessor is permitted to choose and, in accordance with such choice, to receive as payment of the fixed compensation, (1) cash; (2) fuel oil; (3) other oil products suitable for use by the Navy; (4) such an amount of tankage as may be necessary for the conservation by the lessor of such fuel oil as it may elect to receive from the lessee in exchange for royalty crude oils accruing to it from the lease.

The contract of April 7, 1922 does not provide for any fuel depot or for any designated storage project. Nor does it authorize an exchange of royalty crude oils from the lease or from any other lease for the construction of storage facilities generally.

Having given the Government an option to exchange royalty oils accruing to it under the lease for fuel oil, it couples with said option—and makes said option effective to consummate the purpose and policy of administering the naval petroleum reserves for the use or benefit of the Navy—the further option to exchange royalty oils for such storage as is required to conserve the fuel oil so received. The matter is shown in the contract by the following language:

> "The lessee agrees, if and when requested so to do by the lessor, to construct or to pay the cost of construction of steel storage tankage up to but *not in excess of such an amount as shall be estimated*

to be necessary or required for the storage by the lessor of the fuel oil to be received by it as hereinbefore provided in exchange for royalty crude oil from the lands hereby leased; said storage to be constructed *as and when* the same shall become necessary or shall be required for the storage of such fuel oil so delivered by the lessee or its nominee, *and said storage to be located at points designated by the lessor;* the cost of such tankage to be liquidated by lessor by delivering to the lessee or its nominee crude oil certificates hereinbefore referred to, said certificates so delivered to be of the face amount in value equal to the cost of such tankage for which the lessee or its nominee shall have paid or become liable." (Italics supplied) (R. 26).

In other words, the storage authorized by option "4" as enumerated above, is limited by the extent to which option "2" is exercised, and option "2" is limited to an exchange for fuel oil of the royalty crude oil *accruing under this particular lease*. The whole matter is thus shown to have been designed as a method of effecting the conservation of the oil in Naval Petroleum Reserve No. 3 for the use or benefit of the Navy. In no feature does the contract overreach or depart from that policy.

In addition to the lease and agreement incorporated in the instrument dated April 7, 1922, the suit seeks to cancel a supplemental agreement between the parties dated February 9, 1923, made at the request of the Government—at the instance of the Navy Department (R. 595)—pursuant to options "2", "3" and "4" above enumerated contained in the contract of April 7, 1922. That is to say, the Secre-

tary of the Navy elected not to take cash for the Government's royalty crude oils as he might have done under option "1" but rather to exchange the royalty crude oils for fuel oil and other oil products suitable for use by the Navy, together with tanks necessary for the conservation thereof. In this supplemental agreement the Navy adopted a program of four projects, designating the amounts of fuel oil and other products it desired in respect of each project and designating the places for the construction of the storage necessary in respect of each such project. The first project was to be commenced forthwith, certain royalty oils having then accrued to the Government under the lease. The other projects were to be undertaken one after another as, if and when the royalty oils accrued sufficient to furnish by exchange the fuel oil and other products desired in respect of each project, thus effectuating the purpose to erect only such storage as might be necessary to conserve the fuel oil and other products received in exchange for the royalty crude oils accruing to the government from the lease of April 7, 1922, but not from any other lease.

The Issues.

Paragraphs one, two and three of the bill designate and describe the parties (R. 2 and 3). The answer admits (R. 56, par. 1, 2 and 3).

Paragraphs four, five and eight of the bill describe the lands involved; allege that they are owned by the United States, that they contain large quantities of petroleum, that they have been set aside as a naval oil reserve, and that they are included among the lands described in the Act of

June 4, 1920 (R. 3, 4 and 5). The answer admits (R. 56, 57, par. 4, 5, 8).

Paragraph six of the bill alleges that from March 5, 1921 to March 4, 1923, Albert B. Fall was Secretary of the Interior and Edwin Denby was Secretary of the Navy of the United States (R. 4, 5). The answer admits (R. 57, par. 6).

Paragraph seven of the bill quotes the Act of June 4, 1920 (R. 4, 5; also 41 U. S. St. L. Chap. 228, pp. 813, 814). The answer admits (R. 57, par. 7).

Paragraphs nine, ten, eleven and twelve of the bill allege the making of an Executive Order of May 31, 1921, by the President of the United States assigning the Secretary of the Interior to certain duties in relation to the naval petroleum reserves; allege that the same was illegal and obtained by Secretary Fall by fraud (R. 5, 6; also Ex. A. R. 13, 14). The answer admits that the order was made and denies the other allegations (R. 57, 58, par. 9, 10, 11, 12).

Paragraph thirteen of the bill alleges the execution of the lease on April 7, 1922 and sets forth a copy marked "Exhibit B" (R. 6; also 14-36). The answer admits (R. 58, par. 13).

Paragraph fourteen of the bill alleges that the lease, Exhibit B, was "without authority in law" (R. 6). The answer denies (R. 59, par. 14).

Paragraph fifteen of the bill alleges the execution on February 9, 1923 of the supplemental agreement and sets forth a copy marked "Exhibit C". It further alleges that said contract was without competitive bidding and was

therefore illegal, null and void (R. 6; also 36-52). The answer admits the execution of the supplemental agreement on February 9, 1923 and that it was without competitive bidding and denies the rest (R. 59, par. 15).

Paragraph sixteen of the bill alleges that the Mammoth Oil Company has taken possession of the lands under the lease and is operating the same, and that it is a trespasser (R. 6, 7). The answer admits taking possession and operating but denies the rest (R. 59, 60, par. 16).

Paragraph seventeen of the bill alleges that the Mammoth Oil Company has proceeded with the construction of storage facilities under the supplemental agreement and has been paid therefor in oil certificates (R. 7). The answer admits the construction of certain storage facilities but denies that the defendant has been paid therefor, and alleges that it expended in such construction more than one million dollars, and that the improvements were made on the premises of the United States and are of a value to the United States of more than the amount expended (R. 61, 62, par. 17).

Paragraph eighteen of the bill alleges generally that Secretary Fall and Harry F. Sinclair conspired to defraud the United States by the execution of the lease and performed acts resulting in its execution (R. 7). Although this seems not to state any facts, the answer denies the conspiracy, and denies that the execution of the lease was the result of any conspiracy or for any purpose of defrauding the United States (R. 62, par. 18).

Paragraph nineteen of the bill alleges that the negotiations preliminary to said agreement were conducted on behalf of the United States by Secretary Fall (R. 7). The

answer denies and alleges that the negotiations were conducted on behalf of the United States by Secretary Denby and that in connection with such negotiations Secretary Denby made use of the services of officers of the United States Navy and of Secretary Fall and of certain of the bureaus and personnel of the Interior Department, and that all negotiations preliminary to said agreement were conducted under the supervision and control of the Secretary of the Navy (R. 62-63).

Paragraph twenty of the bill alleges that the negotiation and conclusion of the contracts were private and secret negotiations and agreements between Secretary Fall and Mr. Sinclair (R. 7, 8). The answer denies (R. 63).

Paragraph twenty-one of the bill alleges that the lease of April 7, 1922, "Exhibit B", was awarded without competitive bidding and that the agreement contained therein to sell the royalty oils was without competitive bidding. It further alleges that the lease was without authority of law (R. 8). The answer admits that there was no competitive bidding but denies the rest (R. 63, par 21).

Paragraph twenty-one likewise alleges that the supplemental agreement of February 9, 1923, "Exhibit C", was without competitive bidding and was without authority of law (R. 8). The answer admits that there was no competitive bidding but denies the rest (R. 63, par. 21).

Paragraph twenty-two of the bill alleges that the Secretary of the Navy exercised no discretion in relation to the contracts (R. 8). The answer denies (R. 63, 64; par. 23).

Paragraph twenty-three of the bill alleges that others desired to obtain leases on the lands but were denied the

opportunity by Secretary Fall with knowledge thereof in the defendant Mammoth Oil Company (R. 8). The answer denies (R. 64, par. 23).

Paragraph twenty-four of the bill alleges refusal by Secretary Fall to take the opinion of the Solicitor of the Interior Department or of the Attorney General as to the legality of the contracts (R. 8). The answer denies knowledge of any such refusal (R. 64, par. 24).

Paragraph twenty-five of the bill alleges that Secretary Fall, as a condition precedent to granting a lease upon the lands, required quitclaim deeds for mining claims upon the lands, knowing that they were worthless, and secretly gave information thereof to Mr. Sinclair and thereupon Sinclair obtained deeds from the mining claimants, thus fraudulently making it impossible for others to comply with the requirements (R. 9). The answer denies (R. 64-66, par. 25).

Paragraph twenty-six of the bill alleges that Secretary Fall required Mr. Sinclair, as a condition precedent to the obtaining of a lease, to set aside a certain part of the lands for the benefit of one Shaffer (R. 9). The answer denies (R. 66, par. 26).

Paragraph twenty-seven alleges that Secretary Fall fraudulently kept the lease secret from his associates and from Congress and from the public before it was executed and for a considerable time after (R. 10). The answer denies (R. 66, par. 27).

Having averred generally in paragraph eighteen of the bill that Secretary Fall and Mr. Sinclair conspired to defraud the United States by the execution of the lease, and

having devoted paragraphs nineteen to twenty-seven inclusive to averments of things done pursuant to such fraudulent conspiracy, paragraph twenty eight is again a general averment of a conspiracy to defraud the United States by granting the lease in violation of law and upon "an inadequate, improper, and fraudulent consideration" (R. 10). The answer denies (R. 66-7, par. 28).

> "The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another, they have no more effect than other words of unpleasant signification. While in this case the offensive words are used often enough, the facts to which they are applied are not such as to make the defendants answerable to the complainant for the damages and other relief he asks."
>
> *Ambler* v. *Choteau*, 107 U. S. 586, 591.
> *Van Wyck* v. *Winston*, 115 U. S. 228.

If it was lawful for Secretary Fall to carry on negotiations preliminary to the lease under the provisions of the Executive Order; if it was lawful to conduct such negotiations without publicity; if it was lawful to make the contracts without advertisement or competitive bidding; if it was lawful for Secretary Fall not to ask the opinion of the Attorney General as to the legality of the lease; if it was lawful for him to make quieting of certain claims a condition precedent to the lease; then all these matters, not being fraudulent in and of themselves, do not create liability to

civil action because done under a conspiracy, even if such a conspiracy were proved. As Cooley so well states the principle:

> "A conspiracy cannot be made the subject of a civil action unless something is done under it which without the conspiracy would give the right of action."
>
> *1 Cooley on Torts, Third Edition, p. 210.*

All the averments of fraud and conspiracy made in the bill amount, therefore, to no more than that the lease was made for an inadequate and improper consideration. The averments of the bill may therefore be summarized as follows:

A Summary of the Issues.

It is alleged on the one part and denied on the other:

1. That the contracts are invalid (a) because there was no authority in law for their execution; (b) because their negotiation was in violation of law in that it was without competitive bidding; (c) because pursuant to the Executive Order Secretary Fall negotiated the contracts and the Secretary of the Navy took no part.

2. That the lease is fraudulent because granted upon an improper and inadequate consideration.

Trial, Evidence and Findings.

In this brief we will, for brevity and convenience, speak of the United States District Court for the District of Wyoming as the "District Court" and of the United States

Circuit Court of Appeals for the Eighth Circuit as the "Court of Appeals".

The cause was tried in the District Court, beginning March 9, 1925, and continuing for three weeks, and resulted in a decree dismissing the bill on the merits (R. 271). The Court of Appeals reversed the decree of the District Court and remanded the cause with instructions "to enter a decree (a) cancelling said lease and contract as fraudulent, (b) enjoining appellees from further trespassing upon the lands of appellant described in said lease; and (c) providing for an accounting on the part of the appellee Mammoth Oil Company, for the value of all oil and other petroleum products taken under said lease and contract" (R. 851).

Of the issues as above summarized, 1(a) is a mixed issue of law and fact; 1(b) is an issue of law; 1(c) is an issue of fact; 2 is an issue of fact.

As to the issue of fact and law, 1(a), and as to the issue of law, 1(b), the Court of Appeals seems to have concurred with the District Court. The language of the Court of Appeals in that matter is as follows:

> "We content ourselves with saying that on this branch of the case, as at present advised, we are in accord with the conclusion reached by the trial court, that the authority granted by the Act of June 4, 1920 is sufficient to authorize the lease and contract in question" (R. 816).

On the issue of fact, 1(c) above, the evidence showed that Secretary Denby was from the beginning advised of all steps in negotiating the contracts and signed

them with full knowledge of all matters contained therein. That evidence will be referred to in detail later. Upon it the District Court found (R. 272) that the contracts were the contracts of the Secretary of the Navy, and in this conclusion the Court of Appeals concurs (R. 815). On the issue of fact numbered 2 above, the adequacy of the consideration for the lease, the evidence of John McFadyen, George K. Thomas, Gerald Hughes, Judge Amos L. Beaty, Dr. H. Foster Bain, Arthur W. Ambrose and Admiral Robison was that the lease was very advantageous to the United States, and no witness testified to the contrary. Upon this evidence which will likewise be referred to more in detail later, the District Court found that the consideration was adequate (R. 248) and the Court of Appeals does not dissent from that conclusion but apparently concurs (R. 817).

It is seen, therefore, that as to the issues raised by the bill, both courts below concurred in the findings of fact as well as in the conclusions of law. As will be shown later (*infra*, p. 38) the Court of Appeals decided the case against petitioners upon a charge not made in the bill. In stating the charge and the manner in which it arose, the Court of Appeals says:

> "There is no charge of corruption in this case as to any of the officials of the Government, except as to former Secretary of the Interior, Albert B. Fall. * * * Counsel for the United States charge in their brief that Mr. Sinclair received as dividends from the Continental Trading Company, Ltd., $230,500 face value of United States Liberty First 3½% Bonds, which he turned over to Secretary Fall in May, 1922 as a bribe" (R. 816).

The Evidence Is Not Conflicting.

Upon the question of conflicts in the evidence, the District Court says:

> "While one basis of the relief sought revolves around and is determinative solely upon the surrounding facts, a rather unusual situation exists in the case in that there are scarcely any of the facts and circumstances in dispute, each party relying upon its own combination of facts to sustain its conclusions as to what inferences should be drawn therefrom" (R. 228, line 42, to R. 229, line 4).

Upon the same point the Court of Appeals uses this language:

> "Here the Appellate Court is not at the usual disadvantage which prevails when the trial Court determines the facts. The views of the trial Court are not controlling as the situation presents, not so much a dispute as to the evidence or the veracity of witnesses, as it does an opportunity for differences of opinion with respect to the inferences to be drawn from all the circumstances appearing in the record" (R. 818, lines 25-31).

Statement of Facts.

1. (a) *Facts in Relation to the Act of June 4, 1920.*

As bearing upon the issue of law 1 (a) above, namely, that the contracts are invalid because there was no authority in law for their execution, we deem it helpful to set forth briefly some of the matters which Congress must be

presumed to have had in mind in the enactment of the Act of June 4, 1920.

In 1909 and 1910 large tracts of public oil lands in the States of California and Wyoming were by presidential orders withdrawn from entry under the placer mining laws in aid of proposed legislation, upon the suggestion of the Director of the Geological Survey as to the lands in California that at the rate said lands were being patented, all would be taken in a few months and that in view of the increased use of fuel oil by the Navy, there appeared to be immediate need for conservation. In 1912 some of the withdrawn lands in California were by executive orders set aside as Naval Petroleum Reserves Nos. 1 and 2 "for the exclusive use or benefit of the United States Navy" until said orders should be revoked by the President or by Act of Congress. *Pan American Petroleum & Transport Co. et al. v. United States*, decided by this Court February 28, 1927.

Although the lands in Wyoming included in the withdrawal orders of 1909 and 1910 were withdrawn solely that a better disposition of them could be made than was provided by the existing laws, there being no suggestion by the Director of the Geological Survey that such Wyoming lands would ever be needed for a naval oil supply, subsequently a tract of approximately nine thousand acres was by a presidential order dated April 30, 1915, similarly dedicated to the use or benefit of the Navy as Naval Petroleum Reserve No. 3.

The withdrawal orders of July 2, 1910, made by the President pursuant to the Act of June 25, 1910 (36 Stat. 847), embraced practically all public lands believed to

be oil-bearing. From that date until the enactment of the General Leasing Law (41 Stat. 437), the United States was without a policy as to its oil lands except the policy in respect of the naval petroleum reserves fixed by the orders creating them. During this entire period, however—year after year—the subject was before Congress and was exhaustively considered and debated. The policy finally agreed upon and embodied in the Act of February 25, 1920, was that of leasing, which will lead as inevitably to taking all the oil out of the public oil lands covered by the Act, as would have the policy of practically giving the lands away under the placer mining law.

Most private owners prefer to lease oil lands for royalties rather than incur the risks and expense of operating directly and Congress adopted the same policy for the United States. The royalties are, of course, compensation for the entire interest of the landowner.

The Act of February 25, 1920 recognized the rights of *bona fide* claimants under the placer laws by granting to them a preferential right to lease, also preserving the right to perfect their claims under the placer laws, "including discovery." This included the naval petroleum reserves. Claimants who had obtained "producing wells" on lands in the naval petroleum reserves, in addition to their right to proceed under the placer mining laws (Section 37), were entitled to lease of such wells together with an area of land sufficient for the operation thereof and in the discretion of the President the remainder or any part of the claims upon which such producing wells had been drilled (Section 18). Furthermore, the President was given the right to com-

promise and settle disputed placer mining claims within the reserves by exchange or division of land or division of the proceeds of operation (Section 18-a). The Secretary of the Interior was charged with the duty of administering the Act of February 25. The Secretary of the Navy had no authority or power whatever under that act.

Congress, except as above, excluded the naval petroleum reserves from the operation of the Act of February 25, leaving the reserves for further and special legislation.

It was immediately recognized that such further legislation was desirable and necessary if the Navy was to have the benefit of the oil that had been dedicated to it in the naval petroleum reserves.

Congress must be presumed to have known that there were claimants who would be entitled to leases of producing wells on naval reserves and must have anticipated what subsequently happened—the filing of applications for leases of producing wells on the reserves and the granting of many such applications so that oil would be extracted even within the boundaries of the reserves.

Congress must also be presumed to have known that included within the boundaries of Naval Petroleum Reserve No. 1 were privately owned lands; that alternate sections within the boundaries of Naval Reserve No. 2 were privately owned; and that there were or might be claims of title under the placer mining laws on Naval Reserve No. 3.

Further, Congress must be deemed to have anticipated that all the public oil lands adjacent and up to the imaginary lines of the naval petroleum reserves would be leased

under the Act of February 25, 1920, and that no such imaginary lines could shut in and retain oil in the reserves. The situation was that it was probable that the reserves were or soon would become subject to depletion on account of drilling both within and without their boundaries. Congress must be deemed to have realized this situation. *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 245.

It acted promptly by including in "an act making appropriations for the naval service for the fiscal year ending June 30, 1921, and for other purposes", approved June 4, 1920 (41 Stat. L. 813), the following:

> "Provided That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled 'An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain,' or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States; And Provided Further, That the rights of any claimant under said Act of February 25, 1920, are not affected adversely thereby; And Provided Further, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum

> reserves prior to July 1, 1921, not to exceed $500,000, are hereby made available for this purpose until July 1, 1922; Provided further, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct."

In view of these facts and of the language of the Act of June 4, 1920, and of the matters shown in evidence, the District Court upon the issue of law and fact marked 1 (a) above, construed the act as giving authority for the lease and contracts in controversy as made (R. 270). In this conclusion the Court of Appeals concurred (R. 816, lines 13-17).

1 (b) *Facts Bearing on the Question of Competitive Bidding.*

The only fact concerning the issue of law marked 1 (b) above, namely, that the contracts are invalid because they were made without competitive bidding, is that such contracts were made without advertising and competitive bidding in the sense in which those terms are used in Section 3709 of the Revised Statutes covering purchases and contracts for supplies or services; but as to this issue both the District Court and the Court of Appeals held that Section 3709 had no application to the lease and contract here. Upon this question the Court of Appeals said:

> "This special statute" (the Act of June 4, 1920), "not repealing the general statutes, the two stand together, one as the law relating to a special thing, viz., the naval reserves,—the other relating to

> general public land matters. It was therefore unnecessary that there be competitive bidding or advertising as to the making of the lease and contract, and other statutes with relation to the method of transacting the general public business of the United States were not applicable to this situation, the special statute fully covering the same" (R. 814).

We shall endeavor to show in our argument upon the construction of the statute, that the concurrent ruling of the District Court and the Court of Appeals correctly construes the statute on the matter of competitive bidding.

1 (c) *Facts Showing That the Contracts Were the Acts of Secretary Denby.*

As to the issue of fact marked 1 (c) above, namely, the issue upon the allegation that the contracts are invalid because, pursuant to the Executive Order of May 31, 1921, Secretary Fall negotiated them and the Secretary of the Navy took no part therein and exercised no discretion in relation thereto, the evidence briefly stated shows the following facts:

John K. Robison, a Rear Admiral in the Navy, became Chief of the Bureau of Engineering October 1, 1921. Shortly thereafter, under Secretary Denby's order, he assumed charge of all matters connected with naval petroleum reserves (R. 570-71; R. 314-15).

The question of whether or not loss of oil by drainage in Teapot Dome was so threatened that action ought to be taken by the Secretary of the Navy to save the oil, originated shortly before Admiral Robison assumed charge of the naval petroleum reserves, with one Carroll H. Wege-

mann, who had previously been connected with the Department of the Interior when Naval Reserve No. 3 was created, and who originally mapped out and fixed the northern boundary of the reserve at what he then thought to be the axis of a so-called saddle or dip between the Teapot Dome structure and the Salt Creek Dome structure to the south.

Early in September, 1921, in Denver, Dr. Bain, Director of the Bureau of Mines, and Mr. Ambrose, Chief Petroleum Technologist of that bureau, met Mr. Wegemann, then no longer connected with the Government, and a Mr. Fisher of the firm of Fisher & Lowrie, petroleum geologists and engineers of Denver. Dr. Bain had known both men for a long time, officially and socially (R. 662). They showed Dr. Bain and Mr. Ambrose a new structural map which had been made by Fisher & Lowrie, based on an examination and study of the field during the preceding summer by Mr. Wegemann and Mr. Fisher's firm, which disclosed that the axis supposed to separate the main portion of Naval Reserve No. 3 from the Salt Creek Field was nearly a mile farther south than Mr. Wegemann had shown it in his original mapping of the reserve. This and other geological data were discussed between the parties mentioned, as also was the fact that the leases made by the Government on June 15, 1921, in the southern part of Salt Creek Field would probably lead to drainage of that territory and from that on into Teapot Dome (R. 662).

The leases of June 15, 1921, had been directed to be made by Secretary Fall's predecessor, Secretary Payne. They covered 6,400 acres immediately adjacent to the northern boundary of Naval Reserve No. 3 and practically com-

pleted the leasing of all known oil lands in the Salt Creek Field (R. 298, 311-12).

On October 3, 1921, subsequent to his talk with Dr. Bain and Mr. Ambrose in Denver, Mr. Wegemann was in Washington and submitted to the Navy Department a report based on the new map made by Fisher & Lowrie (R. 733, 320-23). Mr. Wegemann also interviewed Judge Finney and Mr. Mendenhall of the Interior Department (R. 733) and left with them a copy of his report (R. 320-3), Secretary Fall being absent from Washington (R. 669).

In this report Mr. Wegemann sets forth the error that had been made in the matter of fixing the position of the saddle in Teapot Dome. He showed that in fact discoveries had been made that fixed the axis of the saddle much farther south in the reserve. The conclusions of his report are summed up as follows:

> "(1) All oil north of the line of the saddle crossing the northwest quarter of Section 28, township 39 north, range 78 west, will be driven toward the main dome of Salt Creek by the advancing body of water in the sand which will advance under hydrostatic head as the oil is drawn from the sand by the wells which will be drilled along the northwest line of the naval reserve and other wells in the main pool.
>
> "(2) There is grave danger that the recovery of the body of oil trapped between the advancing body of water and the large fault in section 33 will be greatly interfered with by the advance of the water. The beds are comparatively flat lying and movements of the oil and water in such beds cannot be predicted. The expense of recovery will be greatly increased due to the uncertainty of the position of

the pool and the total recovery of oil will in all probability be decreased by the invasion of the water.

"(3) There is no doubt that from the point of development of the property and recovery of oil from it, it will be much better to develop the property as a unit before the invasion of the water. The Navy Department cannot prevent draining the property as outlined above. It can make arrangements for the proper development of the property under conditions which will be mutually advantageous to the Navy Department and the operators" (R. 322-3).

Dr. Bain and Mr. Ambrose were not in Washington at the time the Wegemann Report was submitted; nor had they been there since seeing Wegemann in Denver. However, they returned to Washington about October 23, 1921 (R. 663). Secretary Fall was absent from Washington from July 31 to October 4, 1921 (R. 669).

After the return of Dr. Bain and Mr. Ambrose, at a conference (present: Admiral Robison, Secretary Fall, Dr. Bain and Mr. Ambrose), held about October 23, 1921, primarily in reference to Reserves Nos. 1 and 2, there was a general discussion of the subject of drainage (R. 663) and Dr. Bain and Mr. Ambrose stated what they had learned in Denver as to Reserve No. 3.

Dr. Bain testified:

"At that time we had out on the table the maps of Petroleum Reserves Nos. 1 and 2, and discussed specifically the policy in connection with drainage, what drainage meant, how it came about, what the influence of gas pressure was, what was the relative

value of leasing strips along the border, as compared to leasing larger areas, and the whole general proposition of drainage of oil fields at that time. And in that discussion the Secretary was advised by Mr. Ambrose and myself that leasing of strips along the edge of lands was only a temporary defense against drainage; that those wells would themselves drain from the lands further back, and that any such system of leasing would simply mean a continuous series of strip leases. In addition to that, that that would take the gas pressure off from an indefinite and unknown distance, and that this losing of gas pressure would mean that a large amount of oil would be rendered inert and unavailable; that it would be impossible to tell in advance of drilling how far that damage would go in a specific case, but that experience had been that it would go so far that one or two lines of wells was not adequate protection (R. 663-4). * * * Ambrose and I stated at that conference what we had learned from Wegemann and Fisher in Denver. We said that we had seen the Fisher and Lowery map, that there was on the face of it this evidence that a considerable part of the northern part of the reserve would be drained, as fast as wells were drilled in the southern part of the Salt Creek field, and that drainage, while not at the moment large and important, would become increasingly large and important as time went on" (R. 664).

It was determined at the Conference of October 23, 1921, that the data which Dr. Bain and Mr. Ambrose had seen in Denver, taken in connection with the Wegemann Report, warranted a further investigation and the Bureau of Mines was instructed to make a study of the matter and

that bureau delegated the work to Chief Petroleum Technologist Ambrose (R. 665).

About the same time—"about October 25, 1921, possibly a few days later"—Secretary Fall also asked Dr. George Otis Smith, Director of the United States Geological Survey (also a bureau of the Department of the Interior) to have an examination made by a competent geologist of the Survey (R. 316). Director Smith directed Mr. K. C. Heald to make the investigation. In November Heald went to Denver (R. 317) and got the data which Wegemann and Fisher had with reference to the corrected position of the saddle between Salt Creek Dome and Teapot Dome. He also had with him the Wegemann Report and the map accompanying it; also the original mapping of the Naval Reserve made by Wegemann when he was with the Geological Survey (R. 323). Heald then went to the Naval Reserve. He testified that he was able by making observations of a certain dip at one place in the Reserve to check Wegemann's data and he confirmed Wegemann's conclusion that the saddle was about a mile further south and left correspondingly more of the Reserve north of the saddle than had the original mapping of the Reserve (R. 319-20). Upon his return to Washington Heald made a report dated November 30, 1921 (R. 317-18), in which he confirmed Wegemann's correction of the position of the saddle.

Under the instructions given to him at the conference of October 23, 1921, hereinbefore mentioned, Mr. Ambrose of the Bureau of Mines studied the matter and collected data by assembling well logs and production records, and studied the water level of the sands and structural contour maps and evidence in regard to the depletion of gas, all in reference to Teapot Dome (R. 703).

About January 21, 1922, Mr. Ambrose discussed with Dr. Bain the data in reference to Naval Reserve No. 3 which he had gathered in his investigation (R. 665). The Bureau of Mines also had data showing the losses that had been sustained by the Government in the naval reserves in California through inability to make leases therein prior to February 25, 1920 and through delay in leasing thereafter but prior to March 4, 1921. These losses as shown by the data, amounted to several million dollars (R. 677-9). It likewise had data showing losses in recovery in several typical oil fields by delaying until after well reaching the oil pools on neighboring lands had been drilled. To state it briefly, these tables showed that one whose well first reaches the pool where oil is stored in the ground, obtains a larger share of the oil than one who drills later. The report shows that "delay in drilling offset wells results in a loss in ultimate yield per acre of 5 to 50% and that the nearer the wells are to the land being drained, the greater the loss" (R. 683).

Dr. Bain and Mr. Ambrose agreed in their discussion of the question that if the saddle between the Salt Creek Dome and Teapot Dome contained water, the saddle would constitute a seal between the two domes and protect the reserve south of the saddle, but if the saddle contained oil, then they felt certain that the reserve would be subject to drainage which would cover an indefinite area (R. 692). F. B. Tough, Chief Mineral Supervisor in the Wyoming District (R. 660) and other Bureau of Mines men, felt quite certain that there was oil in the saddle (R. 692). Mr. Ambrose felt quite certain that there was oil in the saddle and so expressed himself to Dr. Bain (R. 693).

During the time when these investigations were being made, Secretary Fall was absent from Washington. He returned January 27, 1922 (R. 298).

Soon after the date last above mentioned, there was a conference between Admiral Robison, Secretary Fall, Dr. Bain and Mr. Ambrose (Robison R. 606; Bain R. 670; Ambrose R. 707). The first thing taken up at the conference related to the California reserve. After that there was a discussion of Reserve No. 3 (Bain R. 693-4; Robison R. 645).

Dr. Bain and Mr. Ambrose advised that the Wegemann Report had been confirmed and that:

> ... • • • in the opinion of the Bureau of Mines Naval Petroleum Reserve No. 3 was subject to drainage, that it would be subject to more drainage as time went on and that some lease or other arrangement" (line dropped in printing of record) "was some discussion as to how far south the drainage went. There was discussion as to faulting in there, and as to whether any part of the reserve could be held as free drainage; the attitude taken by the bureau was communicated to the Secretary and others present; and it was based upon information that Mr. Ambrose and I had had coming from the men in the field on the ground, and our study of that data; *and the attitude taken by the Bureau was that we could not tell how far south this drainage was going to extend, that we could not be positive that it would not extend indefinitely*, and Mr. Ambrose, who had given the matter the most study, felt that what was geographically the northern one-third to perhaps one-half would be subject to considerable drainage, and more of it might be, but

> he did not really consider the possibility of drainage in the southern part as very serious or very close (Italics supplied) (Bain, R. 665-6).

The advice Dr. Bain and Mr. Ambrose gave Admiral Robison and Secretary Fall was that they ought to make up their minds to do something as to leasing (R. 666). Upon receiving that advice Secretary Fall said to Admiral Robison, "What are you going to do about it?" Admiral Robison replied, "I certainly am not going to repeat the disaster we had in California. We have got to develop Teapot Dome" (R. 645). However, Admiral Robison stated to Secretary Fall that he would have to take the matter up with Secretary Denby before any action would be authorized (R. 645).

Thereafter Secretary Denby, upon the recommendation of Admiral Robison, decided to lease Naval Reserve No. 3. The decision to lease Naval Reserve No. 3 having been made by the Navy Department, Admiral Robison communicated Secretary Denby's decision to Secretary Fall and outlined what the Navy desired in connection with a lease of Naval Reserve No. 3 (R. 586). Pursuant to the Executive Order, the detailed work of negotiating a lease was done by Secretary Fall and his subordinates in the Interior Department, particularly Mr. Arthur W. Ambrose, Chief Petroleum Technologist of the Bureau of Mines (R. 339-40).

While Secretary Fall acted as spokesman for the Government in the negotiation of the lease, both he and Mr. Ambrose consulted with Admiral Robison throughout the negotiations (R. 327, 708). Admiral Robison testified

that he was in constant touch with the officials of the Interior Department in connection with the development of the terms of the lease (R. 590, 614) and that during the course of negotiations he saw Secretary Denby in connection with the matter from three to five times a week and reported to him the progress of the negotiations and discussed the subject of the negotiations as they progressed. Admiral Robison took an active part in determining what should be the ratio of exchange of royalty oil for fuel oil (R. 594-5) and secured higher royalties than were originally proposed (R. 593). Toward the latter part of March Admiral Robison took the draft of the lease as it then stood, to Secretary Denby (R. 614). He went over that draft with Secretary Denby word for word, paragraph by paragraph, from one end of it to the other. He and Secretary Denby made several changes which they thought were of advantage to the Navy and these changes were incorporated in the final draft (R. 595). Secretary Fall signed the lease on April 7, 1922 (R. 341). He then gave it to Admiral Robison who took it to Secretary Denby (R. 644). Secretary Denby and Admiral Robison again went over the contract in its entirety and Secretary Denby had it in his possession until he executed it (R. 595) on or about April 12, 1922 (R. 287).

Admiral Robison outlined to the Interior Department the program which the Navy desired to carry out in the supplemental agreement of February 9, 1923 and requested the Interior Department to prepare the formal draft (R. 596-9). Admiral Robison took part in the negotiations in reference to the supplemental agreement and went over

every paragraph of it with Secretary Denby before the latter signed it (R. 601).

Upon the evidence, the District Court found that the Secretary of the Navy had made the contracts his own for every purpose (R. 251, 271-2). In this finding the Court of Appeals concurred in the following language:

> "It was proper, of course, for the Secretary of the Navy to act through competent subordinates. Of necessity this must be so. We conclude that enough control was exercised by the Secretary of the Navy through Admiral Robison to preclude a court from holding that the entire power granted by the Act of June 4, 1920, to the Secretary of the Navy had been assumed by the Secretary of the Interior" (R. 815).

Thus the findings of the District Court and the Court of Appeals agree in eliminating the Executive Order of May 31, 1921, as a factor in the cause, the basis being that on the facts disclosed by the evidence the Secretary of the Navy did not surrender or fail to exercise the authority vested in him by the Act of June 4, 1920.

Inasmuch, however, as there are in the bill allegations which reflect on a President of the United States in relation thereto, we deem it not inappropriate to set forth a few facts concerning the Executive Order.

The Act of June 4, 1920 contained one important limitation upon the power of the Secretary of the Navy. Just as Congress had recognized the rights of placer mining claimants in the Act of February 25, 1920, even on the naval petroleum reserves, so, in the Act of June 4, 1920,

the Secretary of the Navy was not authorized to take possession of properties within the naval petroleum reserves on which there were pending claims or applications for permits or leases under the provisions of the Act of February 25, 1920, or on which there were applications for United States patent under any law, and the act contained an express proviso "that the rights of any claimant under said Act of February 25, 1920 are not affected adversely thereby." Therefore, even after the passage of the Act of June 4, 1920, authority over the naval petroleum reserves was divided between the Secretary of the Interior, the President of the United States and the Secretary of the Navy. The Secretary of the Interior had jurisdiction over parts of the reserves upon which there were pending applications for patent or pending applications for lease under the Act of February 25, 1920. The President had jurisdiction to lease additional areas in the naval reserves upon which producing wells were located under Section 18 of that Act and authority to make compromise settlements with placer mining claimants generally under Section 18a of the Act; and the Secretary of the Navy had jurisdiction over the remainder of the reserves.

Early in May, 1921, Secretary Denby suggested to the President that the Secretary of the Interior be requested to handle for the Navy the conservation, development and operation of the lands in the naval reserves (R. 310). On May 11, 1921, Secretary Fall submitted to Secretary Denby a tentative form of Executive Order for the President's signature "if it meets your suggestions of yesterday", and also a brief memorandum stating the

facts and law with respect to naval reserves (R. 308). The memorandum referred to was prepared by Assistant Secretary Finney (R. 306) who was a lawyer and who had had long experience in the administration of the public land laws (R. 300). Finney concurred in, approved and initialed the draft of executive order which went to Secretary Denby (R. 306). In the above memorandum Finney referred to the jurisdiction of the President, the Secretary of the Interior and the Secretary of the Navy over the naval petroleum reserves and expressed the opinion that the President could commit to the Secretary of the Interior the matter of authorizing additional wells or leases under Section 18 of the leasing act and that the Secretary of the Navy might under the Act of June 4, 1920 "request the Secretary of the Interior to handle for the Navy the conservation, development and operation of other lands and naval reserves", and pointed out that such a method "would avoid the duplication, antagonism and division of authority which existed under the past administration with respect to these matters" (R. 310).

We feel compelled to concur with the view thus expressed by Secretary Finney to the effect that with presidential concurrence the Secretary of the Navy might use an official of the Interior Department as well as one of the Navy Department to conduct negotiations on his behalf, and that therefore, the Secretary of the Interior, designated as he was by the President with the concurrence of Secretary Denby, might lawfully conduct these negotiations on behalf of the Navy Department.

The Navy Department was without personnel skilled and experienced in caring for or leasing oil lands (R. 430)

while the Interior Department did have a personnel possessing the requisite skill and experience (R. 430, 310).

Secretary Denby referred the draft of executive order to Assistant Secretary Roosevelt and Admiral Griffin, then Chief of the Bureau of Engineering.

Assistant Secretary Roosevelt, Admiral Griffin, Commanders Shafroth, Stuart and Cobey, and Naval Aide Commander Warren collaborated in suggesting changes in the draft of the Executive Order for the purpose of making clear that the Navy Department, while using the personnel of the Interior Department, still retained control (R. 428; also R. 430, lines 31-37).

After the draft was thus amended, Assistant Secretary Roosevelt of the Navy Department in person first submitted it to Secretary Fall and then took it to the President who signed it (R. 428, lines 37-41).

As to any intention to violate any provision of the Act of June 4, 1920, or any other statute, aside from the general indications at other places therein, the Executive Order closes with these words:

> "Subject to the conditions and limitations contained in this order and the existing laws or such laws as may hereafter be enacted by Congress pertaining thereto" (R. 14, lines 2-5).

It is thus seen from the very terms of the Executive Order that it did not attempt to delegate to the Secretary of the Interior the discretionary authority vested by the Act of June 4, 1920 in the Secretary of the Navy.

Even if any issue as to the Executive Order had not been eliminated by the courts below, the matter would be

settled by the recent decision of this Court in *United States* v. *Chemical Foundation*, No. 127, decided October 11, 1926.

2. *Facts Relating to the Charge That the Lease Is Fraudulent Because Granted Upon an Improper and Inadequate Consideration.*

As to the issue of fact marked 2 above, namely the issue arising on the charge that the lease is fraudulent because granted upon an improper and inadequate consideration, the evidence is that the lease was an unusually favorable one for the Government.

John McFadyen, Manager for the Ohio Oil Company, Rocky Mountain District, a witness for the Government, testified that his company would have been interested in a lease of Teapot Dome but that "It could not have considered making a lease as favorable to the Government" as the one in controversy (R. 403).

George K. Thomas, also a witness for the Government, testified that he is Secretary of the Pioneer Oil Company; that he prepared data for an application by his company for a lease of Teapot Dome under the Act of June 4, 1920, and went to Washington with that in view in March, 1922 (R. 344-345). That company did not put in a bid because it was not willing to make a bid as favorable to the Government as the lease in controversy (R. 347, Cross Examination).

GERALD HUGHES, a witness whose deposition was taken by but not read in evidence by the Government and was read in evidence by the defense, testified that he was a lawyer of Denver, that in October, 1921, he told Secretary Fall that he would be interested in obtaining a lease on Teapot Dome whenever leasing it was determined upon (R. 709). In March, 1922, the witness again saw Secretary Fall (R. 711). At that time Secretary Fall suggested he would hear from the witness a proposition for leasing the Dome and told witness of the proposition he had from Mr. Sinclair, being the same as the terms that were embodied in the lease as witness afterwards came to know them. Thereupon the witness told Secretary Fall that that was the best lease he could negotiate for the Government or that witness had ever heard of and that the terms were beyond what witness would be interested in (R. 712).

AMOS L. BEATY, President of the Texas Company having a capital of $164,000,000, a witness for the Government, testified that by appointment he saw Secretary Fall on March 31, 1922, and gave him a proposition for a lease of Teapot Dome. The witness in his testimony stated the terms that he had offered (R. 348-349).

HARRY FOSTER BAIN, Director of the Bureau of Mines of the Department of the Interior, a witness for the defense, testified that he and Mr. Ambrose, Chief Petroleum Technologist of his Department, discussed with Secretary Fall the relative results that would accrue to the Government under the Sinclair proposition as compared with the Beaty proposition; that they stated to the Secretary that

the royalties proposed by Mr. Sinclair would yield more oil to the Government than those proposed by Mr. Beaty (R. 668).

Admiral Robison, referring to the Texas Company bid, testified that if the Texas Company had put in a bid that was superior to the Sinclair bid it would have been accepted, but that he felt that the terms of the Sinclair bid were not only satisfactory and gave better than normal royalties but gave more than could be gotten from anybody else (R. 653-4).

The Midwest Company produced two-thirds or three-fourths of the total Salt Creek Field production (R. 696). The mid-continent field, embracing Kansas, Oklahoma and North Texas, is not controlled by any single interest but is "the most split-up production in the world" (Bain, R. 696). At the time the Teapot Dome lease was being negotiated the mid-continent price of crude oil was sixty or sixty-five cents higher than the Salt Creek price (R. 594). Under the Mammoth Oil Company contract the Government royalties were placed upon a valuation of posted mid-continent field prices or Salt Creek prices, whichever should be higher as the oil was run (R. 24).

Dr. Bain testified that he considered the lease advantageous in a great many respects; that it gave what they considered good royalties; and that it gave the Navy the option of exchange of its royalty oil for fuel oil which was better than the Navy had been able to get by purchase on competitive bidding through five years' experience (R. 668-9).

Arthur W. Ambrose, Chief Petroleum Technologist of the Bureau of Mines, testified that he believed the terms

of the contract were favorable to the Government and that he so advised Secretary Fall and Admiral Robison (R. 704).

The foregoing constitutes all the evidence bearing upon the question of who it was—the Government or Mr. Sinclair—that got the better of the bargain in negotiating the lease, or bearing upon the question of adequacy of consideration.

Upon the question of adequacy of consideration, the District Court said:

> "Second, there is the significant lack of material damage to the Government which usually attends allegations of fraud, for in the case at bar no attempt has been made to show that the lease (is) controversy was in itself a bad lease for the government, except perhaps theoretically by counsel, but on the other hand the testimony of the plaintiff's own witnesses who are competent to speak upon the subject, tends to show that it is a lease much more favorable to the Government than they as oil operators would be willing to assume. These elements are perhaps not controlling in a case of this character, but they are at least worthy of mention as being conspicuous because their presence is usually the basis of relief sought in cases of this kind" (R. 248).

The Court of Appeals does not dissent from this finding but seems to concur. It says:

> "If a Government official, engaged in making contracts for the Government, receives pecuniary favor from one with whom such contracts are made, a fraud is committed on the Government, and it mat-

ness then owing the M. D. Thatcher Estate Company as follows: $83,000 against indebtedness of M. T. Everhart for which the Estate Company had the Tres Ritos Cattle and Land Company notes as collateral, $10,000 against notes of Tres Ritos Cattle and Land Company, $15,000 against the note of A. B. Fall endorsed by Everhart, and the balance to Mr. Fall and Mr. Everhart.

At the trial each of the defendants objected to each item of deposits, deposit tickets, checks, book entries, ledger entries and each other book of account, records or papers of the various banks produced by the Government in connection with said Liberty Bonds upon the grounds, among other things, as to each item, that it was *res inter alios acta* and in the nature of hearsay as to Mammoth Oil Company (R. 743).

The trial court admitted the evidence with leave to each defendant to move to strike out the same, and defendants each moved upon the grounds stated to strike each item of such evidence.

The Trial Court found that there was no fraud in the procurement of the contracts here in question, even assuming that the above mentioned books and records had been properly admitted in evidence, but for the purpose of making the record sustained the motion to strike so far as it related to the books and records (R. 275-6).

The Court of Appeals held that said evidence was admissible against the defendants (R. 847-50).

We are convinced that the evidence was not admissible, but inasmuch as we concur with the view of the District Court that no fraud is shown even if that evidence be con-

sidered, for reasons of brevity we omit any discussion of its admissibility.

There was no evidence to show that Mr. Sinclair or any of the defendants or anybody connected with any of the defendants, ever had any connection whatsoever with the Liberty Bonds claimed to have been in the possession of Everhart on May 29, 1922. As a basis for the drawing of inferences, however, and in an effort to show Mr. Sinclair was a stockholder or otherwise interested in the Continental Trading Company, Ltd., the Government introduced the following evidence:

Under contract dated November 17th, 1921 the Humphreys-Mexia Company and Humphreys-Texas Company, corporations of the State of Delaware doing business in the State of Texas, sold to the Continental Trading Company, Ltd., a corporation organized under the laws of the Dominion of Canada, 33,333,333 barrels of crude oil to be delivered in the vendors' field tanks as, when and if produced from certain of their properties in Texas at the rate of 50% of the production of the vendor Companies including all royalty oil which the vendor companies controlled and including also such portion of the remaining 50% of their production as might remain after reserving the amount required by them for their own use and for carrying out existing contracts, such reservation not to exceed 40,000 barrels per day. The contract price was $1.50 per barrel. The contract was signed on behalf of the vendor companies by A. E. Humphreys and on behalf of the vendee company by H. S. Osler (R. 445-7).

Upon the same date, *i. e.* November 17, 1921, the two above named Humphreys Companies, joined collectively as

vendor, entered into a contract with the Prairie Oil and Gas Company and Sinclair Crude Oil Purchasing Company, joined collectively as vendee, whereby the vendor agreed to sell to the vendee "fifty (50%) per cent. of all the oil that may be produced from any field or pool in which it now or may hereafter operate, develop, own or control" from certain of its properties in Texas at the prevailing posted market price in the field where produced. The properties described from which the oil was to be produced were the same as those described in the contract with the Continental Trading Company, Ltd. This contract was by its terms subject to the contract which the vendor companies had made with the Continental Trading Company and was not to take effect until that contract was fully carried out (R. 448-50). This contract was signed on behalf of the Humphreys Companies by A. E. Humphreys; on behalf of the Prairie Oil & Gas Company by J. E. O'Neil and on behalf of the Sinclair Crude Oil Purchasing Company by H. F. Sinclair and R. W. Stewart "for the Directors" and by George H. Taber, Jr., as President and A. L. Carlson as Secretary (R. 450). Mr. Sinclair and Mr. Stewart signed tentatively on the 17th.

Again upon the same date *i. e.*, November 17, 1921, Continental Trading Company, Ltd., as vendor entered into a contract with the Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company, joined collectively as vendee, whereby the latter two companies purchased the oil which the Continental Trading Company had purchased from the Humphreys Companies and agreed to furnish the facilities necessary for taking and receiving the oil from

the Humphreys Companies. The price under this contract was $1.75 per barrel, or the field price of Mid-continent crude as posted from day to day by the Prairie Oil & Gas Company less forty cents per barrel whichever price might be higher up to but not exceeding a maximum price of $2.50 per barrel (R. 454-6). This contract was signed on behalf of the Continental Trading Company, Ltd. by H. S. Osler as President; on behalf of the Prairie Oil & Gas Company by J. E. O'Neil as President and on behalf of Sinclair Crude Oil Purchasing Company by George H. Taber, Jr. as President and A. L. Carlson as Secretary (R. 456).

Arrangements having been made for this contract between Continental and Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company, the latter two companies guaranteed the performance by the Continental Trading Company of its contract of purchase with the two Humphreys Companies (R. 451).

On May 26, 1923, Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company negotiated the purchase from Continental Trading Company, Ltd. of an assignment of the latter's contract with the Humphreys Companies for a consideration named in the contract of $400,000, the agreement to be effective as of June 1, 1923 (R. 457-60).

A. E. Humphreys testified that he had begun negotiations on the subject of the sale of 33,333,333 barrels of oil with one H. M. Blackmer (R. 452). Mr. Blackmer was Chairman of the Board of the Midwest Refining Company (R. 442). For some time negotiations had been carried on between Humphreys and Blackmer without result

until on November 14, 1921 they met in New York, no one else being present, and made a deal. Mr. Humphreys then called his attorney, Senator C. S. Thomas, into the matter. He told Senator Thomas he had made a deal with Mr. Blackmer for the sale of 30,000,000 barrels of oil at $1.50 per barrel (R. 452). This was on November 15 (R. 442). On that day Mr. Humphreys and Senator Thomas had luncheon with H. M. Blackmer, J. E. O'Neil, R. W. Stewart and H. F. Sinclair at which there was a discussion of the 30,000,000 barrel contract and also of the second contract which was to take effect upon the performance of the first (R. 442-3). After the contracts were outlined and discussed it was agreed that they should meet again the next day at Mr. Blackmer's rooms in the Vanderbilt Hotel. At the meeting next day further details were discussed and Senator Thomas prepared a draft of the contracts. Mr. Blackmer stated that the vendee in the 33,333,333 barrel contract would be the Continental Trading Company, Ltd. of Canada (Thomas, R. 444; Humphreys, R. 452). Senator Thomas raised a question as to the responsibility of that Company. Mr. O'Neil said "We will receive that oil—we expect to pay for it, and we will guarantee the performance of that contract" (R. 444). Mr. Sinclair, after consulting Mr. Stewart, volunteered the Sinclair Crude Oil Purchasing Company, the other purchaser from the Continental Trading Company, also as a guarantor (R. 453). Sinclair Crude Oil Purchasing Company was owned one-half by the Standard Oil Company of Indiana of which Mr. Stewart was Chairman of the Board, and one-half by Sinclair Consolidated Oil Corporation (R. 445).

Upon this offer of guarantee Mr. Humphreys accepted the Continental Trading Company as the vendee under the contract. Mr. Blackmer stated that the President of that Company would be there the next day to execute the contract (R. 444).

On the next day, which was November 17th, H. S. Osler, appeared as President of the Continental Trading Company and the contract covering the sale to his company was executed (R. 453). The contract between the Humphreys Companies and Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company was also executed on that date (R. 454).

While Colonel Humphreys and Senator Thomas knew that Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company were going to move and take the oil sold by Humphreys to the Continental Trading Company as the nominee of Blackmer (R. 454), and that O'Neil had stated on November 16th that those Companies were going to receive the oil and expected to pay for it (R. 444), they did not seem to have had actual knowledge until sometime later of the re sale contract between Continental Trading Company and the Prairie and Sinclair Companies (Thomas R. 451; Humphreys R. 453).

As to the participation of Mr. Sinclair and Mr. Stewart and Mr. O'Neil in the negotiations held in New York on November 15th, 16th and 17th, Senator Thomas testified:

> "I don't know who constituted the Continental Trading Company, Ltd., except that Mr. Osler appeared there as an officer of it. I did know that the Prairie Oil and Gas Company was interested there

in making another contract with Mr. Humphreys to take effect at the close of the first contract and that the Sinclair Crude Oil Purchasing Company was represented jointly with the Prairie Oil and Gas in the purchase of that remaining oil. I assumed that from the presence of Mr. Sinclair. That purchase was accomplished right there. I do not know whether Mr. Sinclair or Mr. O'Neil had any other interest than that" (R. 451-2).

As to the same matter Mr. Humphreys testified:

"I had no knowledge who constituted or were interested in the Continental Trading Company other than Mr. Osler.

I know there was another contract executed there the same day, and that one of the parties to that other contract aside from my companies was the Prairie Oil & Gas Company and the other party was the Sinclair Crude Oil Purchasing Company. Stewart and Sinclair represented the Sinclair Crude in making this contract and O'Neil represented the Prairie. I had no knowledge of any other purpose of their being there" (R. 453-4).

Mr. H. S. Osler, a barrister of Toronto, Canada, testified that about the middle of November, 1921, he met a gentleman in New York who asked him to handle the purchase and sale of a large quantity of crude oil. At the outset his client informed him that the business was of a confidential nature and that he did not wish his name disclosed (R. 504). His client informed him that a Colonel Humphreys was the owner of property in Texas which numerous interests had desired to purchase; that all previ-

ous negotiations to that end had failed, but that arrangements had now been made for the purchase of about 30 to 33 million of barrels of oil from Humphreys' properties, to be delivered as the oil was produced and that arrangements had also been made for a re-sale of said oil at an advance of 25 cents per barrel to the Prairie Oil & Gas Company and the Sinclair Crude Oil Purchasing Company (R. 505).

Mr. Osler was asked to act as counsel in preparing contracts to cover the purchase and re-sale and also to act for the client in the receipt and payment of all moneys under the contracts (R. 505). Mr. Osler advised his client that his (Osler's) position would be difficult in the event of any litigation growing out of the performance of the contracts unless the business was incorporated (R. 505). This having been agreed to, Mr. Osler caused the incorporation of the Continental Trading Company (R. 505). Application for the charter was made by Mr. Osler's law firm November 16, 1921 under the laws of Canada (R. 464-70). The charter was issued November 17, 1921 (R. 477). The capital stock of the Company was divided into 100,000 shares without nominal or par value (R. 473) all but 5 shares of which were represented by share warrants payable to bearer (R. 472).

Mr. Osler testified that the transaction between his client and the Sinclair and Prairie Companies was outlined to him and not negotiated by him. All the negotiations were over when the matter came to him. He drafted the contract whereby the Continental Trading Company, Ltd. sold to the Sinclair and Prairie Companies the oil purchased from the Humphreys Companies (R. 526).

Mr. Osler's client told him that he had associates in the matter but it does not appear from the evidence who such associates were. He named to Osler his associates (R. 515, 519, 520), but directed that Osler should not disclose their names (R. 504) and also that he did not wish his own name disclosed (R. 504). Mr. Osler therefore declined to disclose any of the names upon the ground of privilege (R. 504) but although stating that he saw in New York some at least of the persons named to him by his original client in the matter (R. 515) he testified:

> "If I saw Sinclair in New York he was a total stranger to me. I had never seen him before and did not know him by sight. *I don't think I know his name even* and it made no impression upon me and I can't visualize him at the meeting with anybody I met in New York on that occasion. It is quite possible he was at one or more of these meetings and of course I don't know, but speaking from recollection it does not come into my mind at all. As to whether James O'Neil was present at these meetings in New York, I am not making any statement as to any other persons that I saw there. I must refuse to do that. I have merely made this statement as to Sinclair in order to clear up what otherwise might be a misunderstanding (italics supplied) • • • Now, when Mr. Roberts asks me the question as to whether I saw an individual there, naming him, I say if he was one of those parties I am unable to give his name because I got that confidentially from my client. If not, I am still unable to give the name because I can not possibly allow Mr. Roberts to ascertain by a process of exclusion what I am not at liberty to give him directly" (R. 514-15).

Upon the finding sustaining the charge that Mr. Sinclair bribed Secretary Fall, the Court of Appeals directed the District Court to enter a decree conforming to the prayer of the bill. In addition to the facts in relation to the charge as stated above, the Court of Appeals drew inferences against the Mammoth Oil Company from the fact that Mr. H. M. Blackmer and Mr. James E. O'Neil on Letters Rogatory issued to them in France, refused to testify as under the laws of France they were permitted to do. It also drew inferences against the Mammoth Oil Company from the fact that Mr. Everhart refused to testify on the basis of his constitutional privilege against self-incrimination. It likewise drew inferences against the Mammoth Oil Company from the fact that Mr. H. S. Osler declined to answer certain interrogatories of the Government under the claim that the answers thereto would disclose matters told to him confidentially in his capacity as barrister and would therefore be violative of his client's privilege. The Court of Appeals also drew inferences against the petitioners from the fact that neither the Government nor the petitioners called Secretary Fall or Mr. Sinclair as witnesses.

Finally, the Court of Appeals drew inferences from matters having no relation to the Continental Trading Company, Ltd., or to the bonds claimed to have been in the possession of Everhart, but which were for the most part introduced by the Government as bearing collaterally upon the issue of adequacy of consideration, and used said inferences as further bases for the inference that Mr. Sinclair bribed Secretary Fall. For convenience of argument

the facts relating to these matters will be stated in connection with the argument. For brevity and to avoid repetition, we beg leave to incorporate those statements by reference. They will be found as follows:

The alleged dominance of Secretary Fall, *infra*, pp. 108-15;

The supposed celerity of Sinclair's proposition of February 3, 1922, *infra*, pp. 127-28;

The matter of the Pioneer and Belgo claims, *infra* pp. 128-36;

The alleged exclusion of other bidders, *infra*, pp. 136-42;

The Shaffer matter, *infra*, pp. 142-44;

The matter of secrecy, *infra*, pp. 144-53;

The exchange by Sinclair of a portion of the Mammoth Oil Company stock, *infra*, pp. 153-56;

The $25,000 loan by Sinclair to Fall in June, 1923, *infra*, pp. 156-60.

The contention of the Mammoth Oil Company is that the finding of bribery is wholly unsustained by the evidence, and that in reaching its conclusion the Court of Appeals after having found that there was no direct evidence of this charge, makes divers inferences which it claims support the charge, the inferences being such as do not reasonably or legitimately follow from any facts proven. The Mammoth Oil Company contends that the Court of Appeals not only drew inferences from facts which do not support the inferences, but further contends that the Court of Appeals from these unauthorized inferences drew others, and in that way took numerous steps away from the facts in the case, and in that way only was it able to make its finding of bribery.

These matters will be more fully set forth in the specification of errors and in the brief of the argument.

SPECIFICATION OF ERRORS.

Petitioner Mammoth Oil Company contends that in reaching its conclusion that the contracts were procured by bribery, the Court of Appeals committed obvious errors of law affecting injuriously the rights of Mammoth Oil Company and specifies the following as errors against said Company by the Court of Appeals:

1. The Court of Appeals erred as matter of law in that it made findings of fact against the Mammoth Oil Company which were not sustained by any evidence.

2. The Court of Appeals erred as matter of law in that no facts were established by any evidence or admission from which the bribery that was found by the Court of Appeals, or any fraud on the part of this petitioner in any matter involved in the cause could be reasonably or legitimately found or inferred.

3. The Court of Appeals erred as matter of law in drawing from the facts in evidence inferences of bribery on the part of Mammoth Oil Company in the making of the lease and contract of April 7, 1922; whereas no such inference could reasonably or legitimately be drawn from such facts.

4. The Court of Appeals erred as matter of law in drawing from the facts in evidence, inferences of bribery on the part of Mammoth Oil Company in the making of the supplemental agreement of February 9, 1923; whereas no such inference could be reasonably or legitimately drawn from such facts.

5. In drawing against Mammoth Oil Company inferences of bribery and corruption the Court of Appeals erred as matter of law in disregarding fundamental rules of law, in that said Court drew from facts in evidence direct sinister inferences which could not reasonably or legitimately be drawn from the said facts in evidence, drew inferences of fraud where inferences consistent with integrity were more reasonably to be drawn from the said facts in evidence, and drew inferences of fraud from matters shown by the record not to be facts.

6. In drawing inferences of fraud the Court of Appeals erred as matter of law in disregarding fundamental rules of law, in that it drew inferences, direct and remote, from other inferences.

As examples of the errors in matter of law relating to the erroneous finding of bribery covered by Specifications of Error Numbers 1, 2, 3, 4, 5 and 6 the Court erred in the following particulars:

(a) The Court of Appeals erred as matter of law in inferring that Mr. Sinclair was a shareholder of or otherwise interested in the Continental Trading Company, Ltd.; whereas no such inference could be reasonably or legitimately drawn from any fact or facts established by the evidence.

(b) The Court of Appeals erred as matter of law in inferring that the Continental Trading Company, Ltd. paid dividends or distributed any of its assets to its shareholders either in Liberty Bonds or otherwise in or prior to May, 1922; whereas no such inference could be reasonably or legitimately drawn from any facts established by the evidence.

(c) The Court of Appeals erred as matter of law in inferring from the inferences above stated with or without other inferences that Sinclair as a shareholder of or otherwise interested in the Continental Trading Company, Ltd., received dividends from said Company in Liberty Bonds at any time, no facts or circumstances being established by the evidence from which such inference could reasonably or legitimately be drawn.

(d) The Court of Appeals erred as matter of law in inferring from the inferences above stated with or without other inferences that Sinclair received $230,500 or any other amount in United States First Liberty Loan 3½% Bonds or any other Bonds out of a total of $300,000 of Bonds or out of any other amount from the Continental Trading Company, Ltd., or from any one else in or prior to May, 1922, or any other time, no facts or circumstances being established by the evidence from which such inference could reasonably or legitimately be drawn.

(e) The Court of Appeals erred as matter of law in inferring that Sinclair had a motive to bribe Secretary Fall, whereas no such inference could reasonably or legitimately be drawn from any facts in evidence and likewise erred in finding that Sinclair had the disposition to bribe Secretary Fall, whereas no such inference could reasonably or legitimately be drawn from any facts in evidence.

(f) The Court of Appeals erred as matter of law in inferring against the Mammoth Oil Company from the refusal of the witness Everhart to testify under the claim of constitutional privilege against self-incrimination, that the said witness did not pur-

chase the Liberty Bonds shown to have been in his possession, the said inference resting upon the assumed principle enunciated by the Court of Appeals that no honest man ever claims the constitutional privilege; whereas no such inference could reasonably or legitimately be drawn from such refusal.

(g) The Court of Appeals erred as matter of law in inferring that Everhart could not have acquired the Liberty Bonds shown to have been in his possession, through any means other than as a bribe for Secretary Fall's benefit; whereas no such inference could be reasonably or legitimately drawn from any facts in evidence.

(h) The Court of Appeals erred as matter of law in inferring that a bribe must have come from Blackmer, Stewart, O'Neil or Sinclair and in inferring from that and from other inferences that Sinclair was the only one of those mentioned and and the only one of all persons who had a motive to bribe Secretary Fall; whereas no such inference could be reasonably or legitimately drawn from any facts in evidence.

(i) The Court of Appeals erred as matter of law in inferring from the above inferences with or without other inferences that Sinclair delivered to Secretary Fall or Everhart the Bonds which it is claimed Everhart had in his possession in May, 1922; whereas no such inference could be reasonably or legitimately drawn from any facts established by the evidence.

(j) The Court of Appeals erred as matter of law in drawing inferences of fraud against the Mammoth Oil Company from the refusal of Henry Smith Os-

ler, a witness for the plaintiff, to answer certain questions propounded to him as such witness by the plaintiff, such refusal being on the claim by the witness that the answers would disclose privileged, confidential communications; whereas no such inference could reasonably or legitimately be drawn from such refusal of said witness.

(k) In like manner the Court of Appeals erred as matter of law in drawing inference of fraud against Mammoth Oil Company from what said Court terms the "evasive testimony" of said witness Osler while testifying as a witness for the plaintiff and under examination by the plaintiff; whereas no such inference could reasonably or legitimately be drawn from such evasiveness.

(l) In like manner the Court of Appeals erred as matter of law in drawing inference of fraud against Mammoth Oil Company from the refusal of Harry Blackmer to testify on Letters Rogatory issued to France; whereas no such inference could reasonably or legitimately be drawn from such refusal.

(m) In like manner the Court erred as matter of law in drawing inference of fraud against Mammoth Oil Company from the refusal of James E. O'Neil to testify on Letters Rogatory issued to France; whereas no such inference could reasonably or legitimately be drawn from such refusal.

(n) In like manner the Court of Appeals erred as matter of law in drawing inference of fraud against Mammoth Oil Company from the fact that neither the Government nor defendants called Albert B. Fall as a witness; whereas no such inference could reasonably or legitimately be drawn from such fact.

(o) In like manner the Court of Appeals erred as matter of law in drawing inferences of fraud against Mammoth Oil Company from the fact that neither the Government nor defendants called Harry F. Sinclair as a witness; whereas no such inference could reasonably or legitimately be drawn from such fact.

(p) The Court of Appeals erred as matter of law in drawing inferences of bribery and corruption against Mammoth Oil Company from other inferences that a trail of deceit, falsehood, subterfuge and bad faith surrounded the making of the lease, whereas none of such inferences could reasonably or legitimately be drawn against Mammoth Oil Company from the evidence.

BRIEF OF THE ARGUMENT.

In reversing the finding of the District Court that there was no bribery in obtaining the lease, the Court of Appeals seems to recognize but does not adequately state the rule that in an equity suit a finding of fact made by the chancellor is presumptively correct and will not be disturbed on appeal unless it is *clearly* (this word is left out in the statement of the rule by the Court of Appeals) against the weight of the evidence or based on a mistaken view of the law, but goes on to say:

> "Here the Appellate Court is not at the usual disadvantage which prevails when the trial court determines the facts. The views of the trial Court are not controlling, as the situation presents, not so much a dispute as to the evidence or the veracity of witnesses, as it does an opportunity for differences of opinion with respect to the inferences to be drawn from all the circumstances appearing in the record. This Court has the same right to draw conclusions from the silence or evasiveness of witnesses as has the trial Court. * * * Further, the conclusion of the trial Court as to fraud is a mixed one of law and fact" (R. 818).

It is apparent from this and indeed appears throughout the opinion that the Court of Appeals reached its conclusion of corruption in this case entirely upon the basis of inferences which it drew.

It will not be amiss, therefore, to briefly review the principles of law that have been long settled by which the force

and effect of the evidence adduced in relation to this charge may be considered, weighed and determined.

Principles of Law Involved.

The Legal Effect of the Evidence Is Always a Question of Law.

Interstate Commerce Commission v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, 91:

> "A finding without evidence is arbitrary and baseless. * * * Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

Florida East Coast Railway Company v. *United States*, 234 U. S. 167, 185;

United States of America v. *Louisville & Nashville Railroad Company*, 235 U. S. 314, 321;

Great Northern Railway Co. v. *State of Minnesota, ex rel.*, 238 U. S. 340, 345;

Philadelphia & Reading Ry. Co. v. *United States*, 240 U. S. 334, 336, 341;

Randall v. *Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 482.

District of Columbia v. *Moulton*, 182 U. S. 576, 579:

> "Where but one inference can reasonably be drawn from the evidence" upon any issue "the question is one of law for the court."

Hepner v. *United States*, 213 U. S. 103, 112 113;

Barrett v. *Virginian Railway Co.*, 250 U. S. 473, 476;
Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91.

In such a case Congress could not grant to any tribunal power to draw an unreasonable, unjustifiable, illegitimate conclusion from the evidence upon the question. Such a grant would be a grant of arbitrary power and unconstitutional.

Under these principles and authorities we believe a further discussion will show that any finding that Mr. Sinclair was interested in Continental Trading Company as a shareholder or otherwise, or that the Continental Trading Company was in any wise the agency of Mr. Sinclair, or that Mr. Sinclair was in any way connected, directly or indirectly, with the Liberty Bonds claimed to have been in the possession of Everhart, was beyond the power of the Court of Appeals, even were it a civil case where no charge of fraud was involved, because no evidence supports any such finding.

Proof of Fraud Must Be Clear, Unequivocal and Convincing—Fraud Cannot Be Presumed.

Far beyond the principle against findings without evidence in ordinary civil cases is the rule in cases where fraud is charged, and especially where fraud of so grave a character as bribery is involved.

The rule in the Federal courts has long been well-settled that fraud is not to be presumed; that it is not to be presumed from any number of lawful acts; that where an act

and circumstance are as consistent with an honest motive as with a dishonest one, the former must be preferred; that fraud cannot be proved by a bare preponderance of the evidence, but only by evidence that is clear, unequivocal and convincing.

Conard v. *Nicoll*, 4 Pet. 291;
U. S. v. *Arredondo*, 6 Pet. 691;
Clarke v. *White*, 12 Peters 178, 196;
Kessler & Co. v. *Ensley Co.*, 141 Fed. 130, 137;
Jones v. *Simpson*, 116 U. S. 609, 615;
United States v. *Maxwell Land Grant Company*, 121 U. S. 325, 381;
United States v. *Hancock*, 133 U. S. 193, 197;
Foster v. *McAlester* (C. C. A. 8), 114 Fed. 145, 152;
The Atlantic Delaine Company v. *James*, 94 U. S. 207;
United States v. *Des Moines Navigation & Railway Company*, 142 U. S. 510;
U. S. v. *Budd*, 144 U. S. 154;
U. S. v. *American Bell Telephone Company*, 167 U. S. 224;
United States v. *Stinson*, 197 U. S. 200;
United States v. *Clark*, 200 U. S. 601;
Mastin v. *Noble* (C. C. A. 8), 157 Fed. 506;
Wilson v. *Sands* (C. C. A. 8) 231 Fed. 921;
Folk v. *United States* (C. C. A. 8) 233 Fed. 177;
U. S. v. *King* (C. C. A. 9) 83 Fed. 188;
United States v. *Wildcat*, 244 U. S. 111.

There are certain well-settled rules of law that guide the courts in the determination of this question. If the circumstances proven are as consistent with honesty and good faith as with fraudulent intent, the inference of fraud is unwarranted. Fraud cannot be established by circumstantial evidence unless it is the only conclusion that can fairly and reasonably be drawn.

U. S. Fid. & Guar. Co. v. *Des Moines Nat. Bank*, 145 Fed. 273; 74 C. C. A. 553.

Proofs which only create a suspicion are not sufficient to warrant a finding of fraud. *U. S.* v. *Hancock*, 133 U. S. 193; 10 Sup. Ct. 264; 33 L. Ed. 601.

A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud. *Lalone* v. *United States*, 164 U. S. 255; 17 Sup. Ct. 74; 41 L. Ed. 425.

In a civil action, where fraud and bribery are charged, the presumption of innocence applies with the same force and effect as it does in a criminal case, and that presumption of innocence outweighs all other presumptions and inferences until it is overcome by clear and convincing evidence. *Jones: Commentaries on Evidence, Second Edition* (1926), Vol. I, Sec. 44; pages 82-84.

The Rules as to Inferences.

No inference is reliably drawn from premises which are uncertain; nor can legitimate inferences be drawn from other inferences nor presumptions indulged which rest upon the basis of another presumption. The law re-

quires an open, visible connection between the principal fundamental facts and the deductions from them and does not permit decisions to be made on remote inferences. A presumption is not a circumstance in proof and it cannot therefore be made the legitimate foundation for another presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact which is sought to be established by the dependent presumption.

U. S. v. Ross, 92 U. S. 281; 23 L. Ed. 707;

Manning v. Insurance Co., 100 U. S. 693; 25 L. Ed. 761;

Looney v. Metropolitan Street Ry. Co., 200 U. S. 480; 26 Sup. Ct. 303; 50 L. Ed. 564;

U. S. Fidelity & Guaranty Co. v. Des Moines Natl. Bank, 145 Fed. 273; 74 C. C. A. 553;

Vernon v. United States, 146 Fed. 121, 125;

Postal Telegraph Cable Co. v. Livermore & Knight Co., 188 Fed. 696, 699;

Cunard Steamship Co. v. Kelley, 126 Fed. 610, 615;

Davis v. United States, 18 App. (D. C.) 468, 495.

Failure to Produce Evidence.

No unfavorable presumption arises from the failure to produce evidence unless there is some duty to produce it, nor unless it is shown to be within the control of the party who fails to produce it, nor from the failure to call

as a witness one whom the other party had the same opportunity of calling, nor if the testimony not given is privileged.

U. S. ex rel. Bajtauer v. *Commissioner of Immigration*, No. 111, October Term, 1926, decided by this Court, Jan. 3, 1927;
State v. *Buckman*, 74 Vt. 309; 52 Atl. 427;
Cross v. *Lake Shore Ry.*, 69 Mich. 363;
First National Bank v. *Hyland*, 6 N. Y. S. 87; 53 Hun 108;
Erie R. R. v. *Kane*, 118 Fed. 223, 238;
Scovill v. *Baldwin*, 27 Conn. 316;
Bleeker v. *Johnston*, 69 New York 309, 313;
Arbuckle v. *Templeton*, 65 Vt. 205;
Crawford v. *State*, 112 Ala. 1.

No inference may be drawn from the refusal of the witness to testify on the claim of constitutional privilege against self incrimination. In *Beach* v. *United States*, 46 Fed. 754, Mr. Justice Stephen J. Field, sitting in the Circuit Court, clearly states the rule as follows:

> "The refusal of the witness to answer the questions, if he thought his answers would criminate himself, was his constitutional right, which the defendant could not control, and no inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself. Marks was called by the Government. If he had testified, his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant. To infer that the very opposite would have been or

might have been the effect of his testimony, had it been given, was unwarranted."

See also:

State v. *Harper*, 33 Ore. 524;
Powers v. *State*, 75 Neb. 226;
State v. *Weaver*, 165 Mo. 1.

Under the same general principle, a defendant is not called upon to introduce evidence to contradict or explain facts which are insufficient to establish any liability against him. The true rule is that silence of a party may be considered in weighing proofs already adduced tending to fix a liability on him in matters where complete and more exclusive knowledge of the facts concerning which he is silent, is laid at his door.

In Jones, *Commentaries on Evidence*, 2d Edition (1926), Vol. I, Sec. 104, p. 179, it is said:

> "It has frequently been recognized and affirmed, that plaintiff cannot make out his *prima facie* case and sustain his burden with the aid of an inference arising from failure of the other party to introduce evidence until such time as he, the plaintiff, shall have made out a *prima facie* case. The defendant is always entitled to rest upon the weakness of the case against him up to that point of the trial."

Owens Bottle Mach. Co. v. *Kanawha Banking & Trust Co.*, (C. C. A. 4) 259 Fed. 838; 842;
Omar Oil & Gas Co. v. *Barr Oil Co.*, 285 Fed 588;
Stimpson v. *Hunter*, 234 Mass. 61;

Shotwell v. *Dixon*, 136 N. Y. 43;
Loper v. *Askin*, 178 App. Div. (N. Y.) 163, 164;
Texas & Pacific Ry. Co. v. *Shoemaker*, 98 Texas 451;
Blackman v. *Andrews*, 150 Mich. 322; 114 N. W. 218;
Chicago Mill & Lumber Co. v. *Cooper*, 90 Ark. 326; 119 S. W. 672;
Thompson v. *Daviltte*, 59 Ga. 472;
Lowe v. *Massey*, 62 Ill. 47;
City of New Orleans v. *Gauthreaux*, 32 L. Ann. 1126.

The Unlawful Inferences Drawn by the Court of Appeals to Sustain the Charge of Bribery.

The opinion of the Court of Appeals clearly discloses that bribery constitutes the basis of its adverse finding. No charge of bribery is made in the Bill of Complaint, but the opinion of the Court of Appeals shows the manner in which the question was raised. At the very outset of its discussion of the question of fraud, the Court states the theory of the Government, which it sustains, as follows:

> "There is no charge of corruption in this case as to any of the officials of the Government, except as to former Secretary of the Interior Albert B. Fall. It is the theory of the Government, bluntly stated, that Secretary Fall received from Harry F. Sinclair, sole owner of appellee, Mammoth Oil Company, a pecuniary consideration which influenced him in granting to said Oil Company a lease of Naval

> Petroleum Reserve No. 3, commonly known as 'Teapot Dome'. Counsel for the United States charge in their brief that Mr. Sinclair received as dividends from the Continental Trading Company, Ltd., $230,500.00 face value of United States Liberty First 3½% Bonds, which he turned over to Secretary Fall in May, 1922, as a bribe" (R. 816).

There is no evidence that Mr. Sinclair ever received any Liberty Bonds as a dividend or otherwise from the Continental Trading Company, Ltd., and there is no evidence that he ever delivered any Liberty Bonds to Secretary Fall (except $25,000 of bonds loaned *in June, 1923*, which admittedly had no relation to the $230,500 lot of bonds, *infra*, pp. 156-60). The Court's conclusion is, therefore, entirely based upon inferences. The Court itself so concedes in the following language:

> "While no isolated fact, circumstance or presumption in the case, and no particular inference may be sufficient to establish Sinclair's connection with the receipt of bonds by Fall or Everhart, yet taking the entire record of what was done, and all the inferences properly to be drawn therefrom, the fact is sufficiently established that the bonds in the possession of Everhart and used in part for Secretary Fall's benefit, were received by Everhart either from Sinclair or the Continental Trading Company, Ltd." (R. 846).

We believe that we shall demonstrate that the court's finding that Sinclair delivered or caused to be delivered bonds to Secretary Fall in May, 1922, was pure inference drawn, not from any fact or circumstance disclosed by the

record, but in the first instance from four other basic inferences, and secondarily from numerous other basic inferences.

(a) The First Basic Inference.

The first and starting basic inference drawn by the Court of Appeals is that Sinclair, Stewart and O'Neil were associates in interest with Blackmer in the purchase of 33,333,333 barrels of oil from Humphreys at $1.50 a barrel and that the purchase could have been made directly from Humphreys by the Prairie Oil and Gas Company and the Sinclair Crude Oil Purchasing Company. In other words, this inference is that Sinclair, Stewart and O'Neil were stockholders in the Continental Trading Company, Ltd., in addition to Blackmer.

The Court of Appeals says:

> "It does not appear why the sale from the Humphreys Company was not made directly to the Prairie Oil & Gas Company and the Sinclair Crude Oil Purchasing Company. It is apparent that there was a handsome profit for someone, presumably the Continental Trading Company, Ltd., in this peculiar transaction" (R. 831).

H. M. Blackmer was in no way associated with either the Prairie Oil & Gas Company or the Sinclair Crude Oil Purchasing Company. Yet he is the one who alone negotiated the purchase of the thirty-million barrels of oil at $1.50 per barrel from Colonel Humphreys, and he alone made the deal with Humphreys (R. 452). It is clear from the testimony of Humphreys and Thomas, taken in con-

nection with that of Osler (all witnesses called by the Government) that Blackmer was Osler's client. Osler testified that when he met his client in New York about the middle of November, 1921, the client told him that he had purchased thirty or thirty-three million barrels of oil from Humphreys and had arranged to sell it to Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company at an advance of twenty-five cents per barrel (R. 504-5).

There is no evidence whatever that the Prairie and Sinclair companies could have purchased directly from Humphreys at $1.50 per barrel. If any inference is to be drawn from the record, the natural and reasonable inference is—nay, the evidence is—that Blackmer had the opportunity to buy, which he had followed for some time, and did buy the oil from Humphreys and then sold it to the companies represented by O'Neil, Stewart and Sinclair.

The evidence shows that Blackmer had associates in the matter but it does not appear who such associates were. He named to Osler his associates (R. 515, 519, 520) but directed that Osler should not disclose their names (R. 504). He did not wish his own name disclosed (R. 504). Osler testified that he saw in New York some of the persons named to him by his client (R. 515) but he stated:

> "If I saw Sinclair in New York he was a total stranger to me. I had never seen him before and did not know him by sight. I don't think I know his name even and it made no impression upon me and I can't visualize him at the meeting with anybody I met in New York on that occasion. It is quite possible he was at one or more of these meetings and of course I don't know, but speaking from recollection

it does not come into my mind at all. As to whether James O'Neil was present at these meetings in New York, I am not making any statement as to any other persons that I saw there. I must refuse to do that. I have merely made this statement as to Sinclair in order to clear up what otherwise might be a misunderstanding.

"• • • Now, when Mr. Roberts asks me the question as to whether I saw an individual there, naming him, I say if he was one of those parties I am unable to give his name because I got that confidentially from my client. If not I am still unable to give the name because I cannot possibly allow Mr. Roberts to ascertain by a process of exclusion what I am not at liberty to give him directly" (R. 514-15).

It may be taken that Colonel Humphreys knew that Blackmer had associates in the purchase of the oil, as he testified, "After agreeing with Mr. Blackmer on the number of barrels *they* would purchase and the price *they* would pay, I called Senator Thomas into the matter" (R. 452). Yet he testified:

"I had no knowledge who constituted or were interested in the Continental Trading Company other than Mr. Osler. I knew there was another contract executed there the same day, and that one of the parties to that other contract aside from my companies was the Prairie Oil & Gas Company and the other party was the Sinclair Crude Oil Purchasing Company. Stewart and Sinclair represented the Sinclair Crude in making this contract and O'Neil represented the Prairie. I had no knowledge of any other purpose of their being there" (R. 453-4).

He understood, however, that their companies were going to furnish the facilities for moving the oil sold by him to the Continental Trading Company, Ltd. (R. 454).

Senator Thomas testified:

> "Prior to attending this lunch, Colonel Humphreys gave me an outline of an agreement which had been practically agreed to between himself and some of the gentlemen present, and, of course, I had that as a background, so that I had some idea of the matter, and what took place at the lunch was a review of what Mr. Humphreys had told me. In substance, he had agreed to sell and these gentlemen, or some of them, had agreed to buy thirty million barrels of oil from his company, that is to say the Humphreys Mexia and the Humphreys Texas Oil Companies, to be delivered from half of the output of the oil wells belonging to these two companies. There was an amount of thirty thousand gallons—not to exceed forty thousand—forty thousand barrels, I mean—from the other half if it should yield so much, which was to be reserved from the sale, if more than that, and the contract would be also satisfied by the vendees taking the difference between the amount required by the forty thousand barrels and the surplus, if any. They also arranged for a second contract to be executed at the same time, to take effect upon the performance of the first, which would also be confined to one-half of the output of the wells after the thirty million barrels had been delivered and paid for" (R. 442-3).

The Court of Appeals from the language of Senator Thomas that "these gentlemen, or some of them, had agreed to buy", draws an inference that Sinclair, Stewart

and O'Neil were interested with Blackmer in the thirty million barrel contract (R. 841). This vague language must not be considered apart from the context of the whole of the testimony of Senator Thomas which shows that he knew of no reason for the presence of O'Neil, Stewart or Sinclair at the meetings other than as representing Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company in connection with the contract made with those companies by Humphreys (R. 451-2).

As to Mr. O'Neil, Mr. Stewart and Mr. Sinclair, their companies were not only making a contract directly with Colonel Humphreys but they were also purchasing from Continental Trading Company the oil covered by the contract between that company and Colonel Humphreys, and were to take that oil, and in taking it were to be governed by many provisions of the contract last named.

Therefore, while not "interested" in the latter contract in the legal sense, Mr. O'Neil, Mr. Stewart and Mr. Sinclair were concerned in relation to its provisions because their companies were to become bound by them.

The matter is further revealed by three contracts read in evidence by the Government as follows:

> (1) The contract of November 17, 1922 between the Humphreys Companies and the Continental Trading Company, Ltd. (*supra*, p. 41; R. 445-7);
>
> (2) The contract of November 17, 1922 between the Humphreys Companies and Sinclair Crude Oil Purchasing Company and Prairie Oil & Gas Company (*supra*, pp. 41-2; R. 448-50), and

(3) The contract of November 17, 1922 between Continental Trading Company, Ltd., and Sinclair Crude Oil Purchasing Company and Prairie Oil & Gas Company (*supra*, pp. 42-3; R. 454-6),

These contracts should be considered in connection with the testimony of Colonel Humphreys (R. 454) and of Senator Thomas (R. 444).

Notwithstanding the uncontradicted evidence given by the Government's own witnesses, showing reasons for the presence of Sinclair, Stewart and O'Neil at the meetings with Humphreys consistent with the utmost integrity on their part and showing nothing inconsistent therewith, the Court of Appeals drew the inference that they were present at the meetings in New York as representatives of the Continental Trading Company, Ltd., as well as of the Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company; that they were, therefore, interested in the Continental Trading Company, Ltd., as stockholders or otherwise and were, therefore, muleting their own companies.

Having reached the conclusion that the Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company were muleted upon the basis of an inference that O'Neil, Stewart and Sinclair were interested in the Continental Trading Company, Ltd., the Court of Appeals uses the conclusion so arrived at as a basis for the inference from which the conclusion itself was drawn; that is to say, the court infers from the inferred muleting of the Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company that O'Neil, Stewart and Sinclair were interested in the Continental Trading Company.

Speaking of Sinclair, the Court of Appeals asks:

> "Would he participate in an arrangement by which the stockholders of the company he represented, would be mulcted to the extent of twenty-five cents per barrel of oil unless he were participating in the profits thereof?" (R. 841).

The same question might be asked in respect of Stewart and O'Neil as the Court of Appeals concludes:

> "The other gentlemen sitting around the New York luncheon table, with the exception of Humphreys and Senator Thomas, were also engaged in this piece of high finance" (R. 840-1).

A more natural and reasonable interrogatory is: Would O'Neil, Stewart and Sinclair dare to participate in an arrangement by which the stockholders of their companies would be mulcted to any extent at all? There is nothing in the evidence from which an inference can be drawn that the Prairie Oil & Gas Company and the Sinclair Crude Oil Purchasing Company or either of them could have purchased the oil sold to the Continental Trading Company directly from Humphreys at $1.50 per barrel or any other price. On the contrary, the evidence shows that Blackmer for a considerable period prior to November 14, had been negotiating with Humphreys for the purchase of that oil and on that day concluded a deal with Humphreys. Further, there is nothing to show, that the Sinclair Crude Oil Purchasing Company and the Prairie Oil & Gas Company could have gotten this amount of oil from any other source or for any less price than $1.75 per barrel. Again,

there is nothing to show that the contract they made with the Continental Trading Company, Ltd., at $1.75 per barrel was not at the time it was made an advantageous contract for their companies. It was anticipated at that time that the Mexican oil fields were giving out and that there would be a general shortage of crude oil and a resulting large increase in price (R. 525). Indeed $1.75 was merely the minimum price. The contract price was "either One Dollar and Seventy Five Cents ($1.75) per barrel or the field price of Mid-Continent crude as posted from day to day by the Prairie Oil & Gas Company less forty cents (40c) per barrel, whichever shall be the higher price, up to but not exceeding a maximum price of Two and One-half Dollars ($2.50) per barrel" (R. 455).

The presumption that men act honestly and are faithful to their trusts overrides all other presumptions until it is overthrown by evidence. Yet the Court of Appeals drew an inference unsupported by any evidence, that the contract made with Continental Trading Company, Ltd., by O'Neil, Stewart and Sinclair on behalf of the companies they represented, mulcted their companies, and from that inference drew the further inference that they were stockholders or otherwise interested in the profits of the Continental Trading Company, Ltd.

As a further basis for its inference that O'Neil, Stewart and Sinclair were interested as stockholders in the Continental Company, Ltd., the Court of Appeals stresses the fact that Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company guaranteed the performance by Continental Trading Company of its contract with the Humphreys Companies.

Here again there is no room for the drawing of an inference of sinister and dishonest conduct or purpose, as the record shows that the Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company had agreed to purchase the oil from Continental Trading Company, Ltd., and had agreed with that company to furnish the necessary facilities for taking and to take delivery directly from Humphreys. The guaranty was an ordinary and reasonable business proposition. While the Humphreys Companies naturally wanted a guaranty because the Continental Trading Company, Ltd., was an unknown foreign corporation, the Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company were in a position to protect themselves as against the Continental Trading Company inasmuch as they were to take the oil directly from Humphreys. It is true that they paid the Continental Trading Company for the oil and depended upon the Continental Trading Company to pay Humphreys, but this arrangement involved no business risk to Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company. If Continental Trading Company, Ltd., defaulted in any payment required to be made by it to Humphreys, the Prairie and Sinclair Companies could easily have protected themselves by continuing to take the oil from Humphreys, paying him pursuant to the guaranty what was due him from the Continental Trading Company, Ltd., and adjusting their own payments to Continental Trading Company, Ltd., in accordance with what they paid to Humphreys for Continental's account.

Another basis of inference used by the Court of Appeals in its conclusion that the Continental Trading Com

pany, Ltd., was the agency of O'Neil, Stewart and Sinclair, as well as of Blackmer, is revealed by its question:

> "Is it reasonable to suppose that the sale to the Sinclair Crude Oil Purchasing Company and the Prairie Oil & Gas Company by the Continental Trading Company, Ltd., of the Humphreys contract, in which there remained a profit of approximately $6,000,000.00 for $400,000.00, would have been made unless the Sinclair Crude Oil Purchasing Company or its officers were connected with and influential with said Continental Trading Company, Ltd.?" (R. 841).

The assignment referred to was made May 26, 1923, effective as of June 1, 1923 (R. 457-60), a year and a half after the contracts of November 17, 1921. It originated in a suggestion made by Osler. He testified, "The idea of it came from me and I originally suggested the sale" (R. 527). He further testified that in May, 1923, the whole situation had changed in several very important respects from that which had existed when the original business was transacted. In the first place, the general shortage of crude oil and the consequent anticipated rise in price had not taken place. Instead of crude oil running short and Mexico drying up, there was a flood of oil from all directions and new discoveries being made, and the price of crude oil, instead of going up very much above the dollar seventy-five cent price, had fallen below it so that that contract had become an onerous contract for the purchasing companies (R. 527). Osler testified that this situation developed many controversies and threats of litigation against the Continental Trading Company, Ltd., by the Humphreys companies.

Humphreys claimed that the purchasing companies were not carrying out the contract in reference to taking the oil. The necessary facilities were not being furnished, and he was making very large claims for damages for breach of the contract. Osler testified that it was quite apparent to him that if the Prairie and Sinclair companies desired to get out of the contract, their obvious course would be to perhaps not flatly and boldly refuse to carry out the contract but to make things very difficult for Humphreys so he could not get his payments as and when he was expecting them and not take the oil as and when he wanted. Another factor in the situation was that the production of the Humphreys properties had decreased and there was no possibility or at least, no probability that anything like the original stipulated amount of oil would be gotten out of his production (R. 528). Osler, referring to the factors above enumerated, testified:

> "Now I communicated that to my client, the same client that spoke to me about it originally. I don't think I met him casually. I think I met him by some special appointment and I drew his attention to it pointedly and I think I said then, as I would say now, I don't want to impute any (intentions) to break the contract to either of these companies, but I did not know the executives in these companies, all I know was if they wanted to get out of the contract that would be the way they would take to do it, and that would mean litigation and trouble and I suggested that it would be advisable to sell the contracts if they could be sold, and probably these companies or possibly at all events these companies would act very differently in carrying out the contract if they were

> the owners of this contract than what they might have acted if they were not the owners. In other words if my guess was right and anything of the kind was in question then the moment they had the whole contract themselves they could act independently and they might act very differently. That is the substance of the advice that I gave them leading up to the practical advice that if it were mine I would endeavor to sell it" (R. 528).

Osler further testified:

> "Replying to your question whether I based my suggestion upon the fact that litigation might disclose who composed the Continental Trading Company, I answer not in the slightest degree. That never came into consideration" (R. 529).

With this explanation in the record showing what operated in the minds of those interested in the Continental Trading Company, Ltd., which caused it to sell its contract to the Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company, and in the light of the fundamental presumption that the business dealings of men are honest until that presumption is overcome by evidence to the contrary, we submit that the fact that O'Neil, Stewart and Sinclair were able to negotiate a contract favorable to Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company, affords no ground for an inference that they were stockholders or otherwise interested in the Continental Trading Company, Ltd.

The Court of Appeals without evidence to support it seems to feel that it has reached an explanation of this

matter more reasonable than that given by the Government's witness. In speaking of the purchase of 33,000,000 barrels of oil from Humphreys by Continental Trading Company and the resale of that oil at an advance of 25¢ per barrel, the Court of Appeals, from the very profits made, infers that Sinclair was one of the principals and shared in the profits of this transaction (R. 645, lines 12 to 14) and in speaking of the sale of the remaining rights in the Humphreys contract by Continental Trading Company in the quotation here considered, the Court of Appeals assumes that conditions had not changed since the making of the contracts and from that assumes that "there remained a profit of approximately $6,000,000" in the Humphreys contract and again infers the sale of this great profit would not have been made for $400,000 "unless the Sinclair Crude Oil Purchasing Company or its officers were connected with and influential with said Continental Trading Company, Ltd." (R. 841). In other words, from the very losses this new contract would occasion to the Continental Trading Company, Ltd., and those interested in it, the Court of Appeals infers that Sinclair was interested and inflicting those losses upon himself. We confess our inability to see that the explanation assumed by the Court of Appeals is more reasonable than that contained in the evidence. Why Sinclair, if one of the principals in and sharing in these great profits, would consent to their sale for $400,000 if the profits still remained, we cannot understand.

Upon the inference that O'Neil, Stewart and Sinclair were Blackmer's associates in the Continental Trading Company, Ltd., and upon the inference that said company

was a "unique and peculiar institution", (R. 834) presumably because the stock of the company was represented by share warrants transferable by delivery though that was fully authorized by Canadian law, the Court of Appeals concludes:

> "The entire transaction of the purchase of the Humphreys oils by the Continental Trading Company, Ltd., and the resale to the Prairie Oil & Gas Company and Sinclair Crude Oil Purchasing Company, bears the earmarks, either of a swindle of the stockholders of these companies, which of course is not a question before us, *or a scheme to create a fund to be used in the way the Government claims the profits of the Continental Trading Company, Ltd., were in part used, viz, for a sinister and unlawful purpose or both*" (italics supplied) (R. 838).

It then supports that inference by another set of inferences and sounds an introductory note for the drawing of such inferences by stating:

> "The record throws little light on the purposes of this most peculiar transaction, and the parties who could explain the same seem to be either conveniently absent from the country or strangely and eloquently silent" (R. 838).

The Court of Appeals then proceeds to support the inference that O'Neil, Stewart and Sinclair were associated with Blackmer in the Continental Trading Company, Ltd., by drawing inferences based upon Blackmer's refusal to testify, the refusal of Osler to answer certain questions, O'Neil's refusal to testify, Stewart's absence from the trial

and the failure of Mammoth Oil Company to call Sinclair as a witness.

The record does not show or afford a ground for legitimate inference that anybody mentioned in the cause, other than H. M. Blackmer and H. S. Osler, could have thrown any light on the purposes and personnel of the Continental Trading Company, Ltd.

H. M. Blackmer was questioned in France by the Government under Letters Rogatory, and as he might do in France, he made this answer:

> "I have retired from business and I do not intend to be drawn into this controversy. Because I have done nothing contrary to law, honor or morality, directly or indirectly, concerning this matter, I ask the Judge to pardon me if I respectfully refuse to reply to this question or to other questions which may be put to me" (R. 546).

If the Mammoth Oil Company had sought to interrogate Mr. Blackmer and his answer had been as it actually was here (and there is every indication that it would have been the same) would that have been taken as affirmative evidence in favor of Mammoth Oil Company? There is nothing in the record to charge Sinclair or the Mammoth Oil Company with the refusal of Blackmer to testify or to indicate that Blackmer in refusing was acting for the interests of Sinclair or for any reasons other than his own. The record shows that the Continental Trading Company, Ltd., was his creature and that he was Osler's client. Yet the failure of the Government in its fishing expedition to obtain something against the Mammoth Oil Company and Mr. Black-

mer's refusal to disclose his reasons for organizing the Continental Trading Company, Ltd. is treated as evidence from which to draw an inference that O'Neil, Stewart and Sinclair were stockholders in the Continental Trading Company, Ltd.

The Court of Appeals asks, "Why should Osler refuse to disclose the connection, if any, of Sinclair with this company?" (R. 841-2). Osler himself answers that question. He had declined to disclose either the name of his client or the names of any of the persons revealed to him by his client as associates in the Continental Trading Company, Ltd., upon the ground that such matters were communicated to him confidentially in his capacity as a barrister. His client had asked him not to disclose either his name or those of his associates (R. 519) and he stated that he would not answer any question as to *any* specified individual because he could not allow Government counsel to ascertain by a process of exclusion what he was not at liberty to disclose directly (R. 515). Yet he does show that Sinclair could not have been either his client or among those mentioned by his client (*supra*, pp. 68-9; R. 514-5). The Court of Appeals thought the very claim of privilege by Osler was a matter of grave suspicion in that it extended "to matters clearly without the scope thereof" (R. 835-6). It was not so construed by the courts of his own country. While they eventually decided against him by a divided court, even the majority held that he was entirely within his rights in making the claim of privilege and that indeed it was his duty to his client to make the claim and contest (R. 216).

There is nothing in the record to charge Sinclair or the Mammoth Oil Company with the refusal of Osler to testify

more fully than he did and the fact that Osler at his client's request did not wish to disclose the business and affairs of the Continental Trading Company, Ltd., affords no inference that Sinclair or Stewart or O'Neil were stockholders in the Continental Trading Company, Ltd.

The District Court held that under the evidence, Osler and the Continental Trading Company, Ltd., were the creatures of Blackmer. It declined to speculate as to the reasons why Blackmer refused to testify and why he desired Osler not to testify as to the Continental Trading Company, saying:

> "As to why he designated a company instead of himself to become the intervening party, is not disclosed, nor do we know that it is material inasmuch as it is not shown that Sinclair was interested in the company or that any other connection between Fall and Sinclair was disclosed in regard to it. Blackmer may have had people other than either one of these interested with him in his deal and for that reason may have found it necessary and convenient to have organized a company. Being an officer of the Midwest Refining Company, he may not have desired to testify in regard to the details of the transaction for the reason that it might be thought by his company that he should be held accountable for the profits derived in his brokerage transactions, or he may have been desirous of avoiding income taxes, or his refusal may have been based upon the ground that as there was no connection between his transaction and the Mammoth lease, that it was not the concern of other people in their investigation of an entirely different and disconnected transaction. *In the realm of speculation, we may allow our imaginations to roam at will*" (Italics supplied.) (R. 250-51).

Mr. James E. O'Neil was interrogated by the Government at Paris, France on Letters Rogatory, and as permitted by the laws of France, the witness made this reply:

> "To the question whether the witness had an official position in the Prairie Oil & Gas Company he replied that he had decided not to testify to any fact in connection with this proceeding, that he had no interest in the affairs which are involved, nor had he done any act which was illegal or contrary to morals relative to this affair; that his health is not good; that he was present contrary to the instructions of his physicians; that he had retired from business, and that because of these circumstances he preferred to remain outside the proceedings in suit, and he respectfully asked the judge to excuse him, and refused to reply to the question which had just been put to him or to any others which might be put." (R. 548).

The fact that the Government got nothing when it fished with O'Neil is again taken as though he had given affirmative evidence against the Mammoth Oil Company, and the Court of Appeals having already inferred that O'Neil along with Stewart and Sinclair were associated with Blackmer in the Continental Trading Company, Ltd. draws from O'Neil's refusal to testify the inference that Sinclair must have been such an associate. In other words, here again the Court of Appeals reaches a conclusion from a premise inferred from the conclusion. Neither the Mammoth Oil Company nor Sinclair can be charged with O'Neil's refusal to testify. He was in no way connected with the Mammoth Oil Company or with the leasing of Naval Reserve No. 3. He

stated the reasons for his refusal to testify. If those reasons are not to be accepted as true then the true reasons are purely a matter of conjecture even as to O'Neil and surely cannot be made the basis of any sort of inference against the Mammoth Oil Company. Here again we ask: If the Mammoth Oil Company had sought to take O'Neil's testimony and his answers had been the same as they actually were (and there is every indication that they would have been the same) would that have been taken as affirmative evidence in favor of Mammoth Oil Company?

The Court of Appeals also seems to charge Mammoth Oil Company with the failure of the Government to procure the testimony of Mr. Robert W. Stewart and quotes from the brief of Government Counsel to the effect that "a subpoena was issued for Mr. Stewart, but the marshal was never successful in serving him. During the trial he was in Mexico and South America" (R. 838). There is not a syllable of evidence in the record to substantiate such statement. On the contrary, the record shows that in the District Court Counsel for the Government stated that Stewart was under subpoena (R. 183). This declaration against interest in open court is at least some evidence of the fact stated. The Court of Appeals permitted Counsel for the Government to substitute for the record fact a statement that the statement made to the Trial Court was a mistake (R. 838) and apparently accepted the statement made by Counsel in their brief. Even were Counsel's self-serving declaration acceptable it should be noted that Counsel did not state in their brief when Stewart is alleged to have left the country, when the subpoena was

issued for him and what effort was made to serve such subpoena. This self serving declaration is not evidence against the petitioners but if it be accepted, the fact remains that Stewart was no more available to the Mammoth Oil Company as a witness than he was to the Government and the Mammoth Oil Company had no connection whatever with the failure of the Government to produce him at the trial. We submit that such failure cannot be used as a basis for the inference that either Stewart or Sinclair was a stockholder in Continental Trading Company, Ltd. and affords no basis for conjecture as to what Stewart's testimony would have been had he been called at the trial.

The final and crowning basis for the inference that Mr. Sinclair was a stockholder in the Continental Trading Company, Ltd. is stated by the Court of Appeals as follows:

> "From all the circumstances, *especially in view of his failure to testify and explain the formation of this corporation or to deny his connection therewith*, ..the reasonable inference is that Sinclair was one of the principals and shared in the profits of this transaction." (Italics supplied.) (R. 845.)

The record does not contain a scintilla of evidence from which it can be inferred that Sinclair could have explained the formation of the Continental Trading Company, Ltd. There is nothing to show that he had any knowledge of the business or affairs of the Continental Trading Company, Ltd. or as to who were its stockholders other than as was disclosed by the Government's own witnesses. The fact that he was charged in the brief of Government Counsel with being a stockholder of Continental Trading Company,

Ltd. affords no proof that he was such a stockholder, and the mere charge so made cannot be made the basis of an inference against him. As Mr. Sinclair's alleged silence is used by the Court of Appeals to support its entire structure of inferences, we shall consider it later in connection with such entire structure.

We have now discussed all of the bases used by the Court of Appeals in arriving at its first basic inference that Mr. Sinclair was one of the stockholders in the Continental Trading Company, Ltd. We have seen that it reached this conclusion partly by drawing inferences from facts or circumstances more reasonably consistent with a conclusion that he was not such a stockholder; partly by drawing inferences of dishonesty from facts and circumstances entirely consistent with the utmost integrity; partly by drawing inferences from other inferences and using the conclusion of an inference as the basis for the inference itself; and partly from mere conjecture not rising to the dignity of inference.

We now reach the second basic inference without which the Court of Appeals could not have arrived at its conclusion that Sinclair received Liberty Bonds from the Continental Trading Company, Ltd.

(b) The Second Basic Inference.

The Court of Appeals infers that the Continental Trading Company, Ltd. paid a dividend to its stockholders prior to May 29, 1922, in Liberty Bonds. This is in truth not even an inference; it is mere conjecture. There is not a particle of evidence that the Continental Trading Company,

Ltd. paid any sort of a dividend either in Liberty Bonds or otherwise at any particular time prior to such distribution as might have been required on final dissolution of the Company in August, 1923 (R. 480-1). It is claimed that on May 8, 1922, H. S. Osler took delivery of $300,000 face value of bonds which had been purchased for the account of the Continental Trading Company (R. 488). The Court of Appeals infers that these bonds were distributed by Mr. Osler as dividends or as assets to the holders of coupon share warrants of the Continental Trading Company, Ltd. without the slightest evidence from which to draw that inference merely because "it would be quite natural that a Company with so little expense, its officers being mere clerks in Osler's office and making so much money out of the purchase and re-sale of the Humphreys oils, and making it so easily would distribute dividends to its shareholders" (R. 845).

(c) The Third Basic Inference.

The third basic inference drawn by the Court of Appeals is a synthesis of inferences: first, that Mr. Sinclair had a motive to bribe Secretary Fall; second, that he was disposed and willing to bribe an officer of the Government; third, that of all the shareholders of Continental Trading Company, Ltd. (Blackmer and his undisclosed associates and the inferred shareholders, O'Neil, Stewart and Sinclair), who were entitled to receive the inferred dividend from that company, Mr. Sinclair was the only one who had a motive and the disposition to bribe Secretary Fall; and fourth, that indeed Mr. Sinclair was the only one of

all people, who dealt or might deal with Secretary Fall, who had a motive and the disposition to bribe him.

The record affords no basis for an inference that Sinclair had a motive to reward by bribe unless it be held that a man desires to so reward a Government official for negotiating with him a lease that others, witnesses called by the Government (McFadyen, Hughes and Thomas) testified they would not have considered because too onerous to the lessee (*supra* 34-5). This lease "of great value" (R. 839) was a lease which Dr. Bain deemed greatly advantageous to the United States (R. 668-9), which Mr. Ambrose advised was favorable to the Government (R. 704) and which Admiral Robison testified was not only satisfactory but gave the Government more than he thought it could get from anybody else (R. 653).

The inference that Sinclair was so base as to be willing to bribe an official of the Government, is not an inference drawn from any fact or circumstance, but is conjecture arrived at in the face of the record and of the presumption that men are honest until proven dishonest.

The Court of Appeals says "none other beside Sinclair in the company of men sitting around the table and arranging the Humphreys deal had any connection with Secretary Fall either at that time or in the future, so far as the record shows" (R. 845). Blackmer, O'Neil and Stewart are not parties to this suit. The record quite naturally does not show whether they had any connection with Secretary Fall.

The record also quite naturally fails to show what dealings other strangers to this suit might have had with Secretary Fall. As Secretary of the Interior Mr. Fall had

charge not only of the Government oil lands outside the Naval Petroleum Reserves subject to lease under the General Leasing Law but also of the oil lands belonging to the various tribes of Indians. He had charge of the public lands of the United States generally. If the presumption is to be indulged that no money or property ever reached Secretary Fall except through corruption, then how many opportunities for corruption were afforded him through the means of his great trust?

(d) The Fourth Basic Inference.

The Court of Appeals found it necessary to draw still a fourth basic inference to arrive at its final conclusion that Mr. Sinclair bribed Secretary Fall. It asks "Why is the plea of self incrimination—one not resorted to by honest men—the refuge of Fall's son in law Everhart?" (R. 842).

Speaking of the $200,000 of bonds claimed to have been acquired by Mr. Osler on May 8th, 1922, the Court says:

> "More than $200,000.00 of these assets in the form of Liberty Bonds had either been sold by May, 1922, and purchased by Everhart, or had reached him in other ways. If he had purchased them on the market there would be no reason for him to claim that testimony so showing would incriminate him, nor would there have been reason for Osler to evade testimony on this question. It is a reasonable and proper inference under these circumstances that Everhart did not receive the bonds through purchase" (R. 846).

Everhart testified that certain bonds in his possession on May 29th, 1922 were held by him in his own right as a prin-

cipal and he declined to give any further testimony concerning them on the basis of his constitutional privilege (R. 537). The record shows that Secretary Fall and Everhart were joint owners of the Tres Ritos Cattle & Land Company. This evidently was a company of considerable size with holdings of value as evidenced by the fact that notes of that company had been accepted by the Trustees of the Thatcher Estate as collateral to loans of very large amounts (R. 538). The evidence in relation to the bonds was that Everhart had them, not Secretary Fall, and that more than half were used for the benefit of Everhart, large portions of them on his own individual indebtedness and other portions on indebtedness of the Tres Ritos Cattle and Land Company of which he was half owner. Were there not ways consistent with integrity whereby Everhart could obtain possession of Liberty Bonds? The Court of Appeals, in the quotation last above, shows that one way in which Everhart could have obtained the bonds was that he might have purchased them. If they might have been so obtained, must not the inference be that they were obtained by purchase, rather than that they were dishonestly acquired?

The Court of Appeals does not go so far as to challenge Everhart's claim of privilege but after announcing the new and singular principle that no honest man ever claims the constitutional privilege, draws the inference that Everhart did not purchase the bonds. Further, although the Court infers that Everhart was a dishonest man, it infers that he could not have acquired the bonds by any means other than by taking them as a bribe for Secretary Fall. Thus the Court of Appeals weaves into the inference that

Everhart did not purchase the bonds and into the inference that he could not have acquired the bonds by any means other than by taking them as a bribe for Secretary Fall, a third inference that there were matters involved which gave to Secretary Fall a basis for demanding a reward for some disservice to the Government in connection with the lease. Such an inference is drawn in contradiction of the record that the lease was most advantageous to the Government and onerous to the lessee and that in the negotiation of the lease everything in it was argued about and fought over (R. 328; 668).

Any inference drawn from Everhart's claim of privilege is pure conjecture even as to Everhart. Despite that and despite the fact that neither the Mammoth Oil Company nor Mr. Sinclair had any connection whatsoever with the claim of privilege by Everhart and in the face of the unquestionable rule that the assertion of a privilege by a witness which relieves him from testifying cannot be charged to either party to the action, the Court of Appeals uses the inference it draws from Everhart's claim of privilege against the Mammoth Oil Company. In *Burdick* v. *United States*, 236 U. S. 79, 94, this Court says:

> "If it be objected that the sensitiveness of Burdick" (a witness) "was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in theory of law."

We submit that the Court of Appeals was unmindful that the constitutional privilege was intended as a shield for the innocent as well as, even more than, for the guilty.

An innocent person may expose himself to accusation and even condemnation by being compelled to disclose facts and circumstances known only to himself but which when once disclosed, he may be entirely unable to explain as consistent with innocence. In any event Mr. Everhart did no more than exercise a privilege given him by the Constitution of the United States, an instrument that requires no apology.

We now have four basic inferences, all of them drawn by the Court of Appeals in violation of fundamental principles of law:

(a) That O'Neil, Stewart and Sinclair were associated with Blackmer in the Continental Trading Company, Ltd. and were therefore stockholders or otherwise interested in that Company entitled to a share in its profits.

(b) That the Continental Trading Company, Ltd. paid a dividend prior to May 29th, 1922, in Liberty Bonds.

(c) That Mr. Sinclair, and he alone of the actual and inferred stockholders of the Continental Trading Company, and indeed he alone of all people, had a motive and the disposition to bribe Secretary Fall; and

(d) That Everhart could not have acquired the bonds which he had in his possession in May, 1922, by purchase or through any means other than receiving them as a bribe for Secretary Fall, who, it is inferred, had a basis upon which he might demand a reward.

The Inferences Drawn from the Four Basic Inferences.

Although there is no evidence as to how or in what manner or from whom Everhart acquired the Liberty Bonds which he is claimed to have had in his possession on May 29th, 1922, and which he testified he held as a principal but which he used largely for his own but partially for Secretary Fall's benefit; although there is no evidence as to what Osler or the Continental Trading Company, Ltd. did with the bonds claimed to have been delivered to Osler on May 8, 1922; although there is no evidence that Sinclair at any time received any bonds from the Continental Trading Company, Ltd.; and although there is no evidence that he delivered to Secretary Fall or Everhart or anybody for Fall's account any of the Bonds mentioned, the Court of Appeals found that Mr. Sinclair received as dividends from the Continental Trading Company, Ltd. $230,500 face value of United States Liberty First 3½% Bonds which he turned over to Secretary Fall in May, 1922 as a bribe.

The first part of the finding that Mr. Sinclair received as a dividend $230,500 face value of bonds from the Continental Trading Company is purely an inference since there is no evidence that he so received bonds, and it is an inference not from any fact or circumstance proved but is drawn from the first two of the above enumerated basic inferences, namely, (a) that Mr. Sinclair was a stockholder in or otherwise interested in the Continental Trading Company, Ltd. and (b) that the Continental Trading Company, Ltd. paid a dividend in May, 1922. Similarly, the other half of the finding that Mr. Sinclair delivered said bonds to

Secretary Fall is purely an inference since there is no evidence that he delivered any of said bonds, and it likewise is an inference not from any fact or circumstance proved but is drawn from the third and fourth of the above enumerated basic inferences, namely (c) that Mr. Sinclair and he alone of Blackmer and the inferred stockholders of the Continental Trading Company and he alone of all people had a motive and the disposition to bribe Secretary Fall and (d) that Mr. Everhart could not have acquired the bonds by purchase or by any means other than by receiving them as a bribe for Secretary Fall who, it is inferred, had grounds upon which to demand a reward in the form of a bribe.

Counsel for the Government in their brief in opposition to the Petition for Certiorari in this case claim that the Court of Appeals "was not building one assumption upon another. It was making a single inference from many proven circumstances all pointing one way" (Brief, p. 11).

We challenge Counsel for the Government to point to a single proven fact or circumstance in the Record which connects Mr. Sinclair with the receipt of bonds from the Continental Trading Company, Ltd. or the delivery of bonds to Everhart.

An easy way to avoid pointing out *any* circumstance is, with a broad sweep of the hand, to say, "*many* circumstances."

We submit that the Court of Appeals could not have reached its conclusion that Mr. Sinclair received bonds from the Continental Trading Company or that he delivered them to Secretary Fall by any number of reasonable and legitimate inferences drawn from proven facts or circum-

stances and that it reached its conclusion by inferences drawn from the four basic inferences which we have enumerated and which were themselves drawn in violation of fundamental rules of law. In other words, the Court of Appeals erred as matter of law in drawing the basic inferences and again erred as matter of law in inferring its conclusions from the basic inferences.

An analysis of the entire opinion in its dealing with the question of fraud demonstrates that the conclusion of the Court of Appeals consisted of inferences drawn from other inferences. Indeed, the final paragraph of the opinion on this subject indicates the matter. The Court says:

> "While no isolated fact, circumstance or presumption in the case and no particular inference may be sufficient to establish Sinclair's connection with the receipt of bonds by Fall or Everhart, yet taking the entire record of what was done, and all the inferences properly to be drawn therefrom, the fact is sufficiently established that the bonds in the possession of Everhart and used in part for Secretary Fall's benefit were received by Everhart either from Sinclair or the Continental Trading Company, Ltd" (R. 846).

How was it established that the bonds in the possession of Everhart and used in part for Secretary Fall's benefit were received by Everhart either from Mr. Sinclair or the Continental Trading Company, Ltd.? There is no evidence as to how Everhart obtained those bonds. The answer must be that the Court of Appeals inferred that it was so, and not from any fact or circumstance proved but from inferences that Secretary Fall had a basis upon which to demand

a reward in the form of a bribe, that no one beside Mr. Sinclair, or somebody connected with the Continental Trading Company, Ltd., had a motive to bribe Secretary Fall, and that Everhart could not have purchased the bonds or acquired them by any means other than as a bribe for Secretary Fall.

The Court of Appeals then goes on to say: "that Company, we have pointed out, is shown to have been the agent of Sinclair, Blackmer, O'Neil and Stewart" (R. 846). Of what does such a showing consist? As to everybody except Blackmer it is purely inference consisting of a number of unlawfully drawn inferences. As we have seen before, this inference charges Sinclair, O'Neil and Stewart with dishonesty and fraud against their own companies, when the only natural inference from the facts is that they were dealing honestly, and solely in the interest of their own companies.

The Court proceeds: "Its assets consisted principally of Liberty Bonds. These assets were delivered to the shareholders, as Osler's letter shows" (R. 846-7). Mr. Osler's letter was dated August 9, 1923, more than a year after the delivery of bonds to Everhart is even claimed. It does not show when the assets of the company were distributed; it does not show that there was ever any distribution of Liberty Bonds to its stockholders. It merely states, without reference to dates, that "all debts and liabilities of the above company have been distributed and it has parted with its property and divided its assets ratably amongst its shareholders" (R. 480-1). There is not a scintilla of evidence that the Continental Trading Company distributed

Liberty Bonds or any other character of assets in or prior to May, 1922. It is therefore pure inference that Mr. Sinclair received bonds from the Continental Trading Company in or prior to May, 1922, drawn not from a fact or circumstance proved but from the two other inferences that the Continental Trading Company distributed Liberty Bonds in or prior to May, 1922, and that Mr. Sinclair was a stockholder in that Company.

The Court of Appeals concludes:

> "If by direct evidence it appeared that Sinclair was the owner of certain Liberty Bonds which afterwards appeared in Secretary's Fall's hands, in view of all the circumstances of this case, a court could not escape the conclusion that Sinclair had transferred them to Fall. *The only difference here is that the bonds were the property of an agency in which Sinclair was interested, and in some manner reached Everhart and Secretary Fall*" (Italics supplied), (R. 847).

In the conclusion embodied in the sentence above italicized the Court of Appeals in fact concedes that it must conjecture as to how Everhart acquired the bonds and it infers that he got them from Mr. Sinclair by inferring that Mr. Sinclair was a stockholder in Continental Trading Company, that as such stockholder he was entitled to receive in May, 1922, a dividend from the Continental Trading Company, that he and he alone of the actual or alleged stockholders of the Continental Trading Company and he alone of all people had a motive to bribe Secretary Fall, that Everhart could not have acquired the bonds in any way

other than as a bribe for Secretary Fall and from those inferences drew the inference that Mr. Sinclair did receive and deliver to Everhart or caused to be delivered to him by the Continental Trading Company Liberty Bonds in May, 1922, as a bribe for Secretary Fall.

Inferences Drawn by the Court of Appeals to Support the Two Inferences Drawn from the Four Basic Inferences.

Having inferred from the four basic inferences hereinbefore discussed that Mr. Sinclair received Liberty Bonds from the Continental Trading Company, Ltd., and that he delivered said bonds to Secretary Fall as a bribe, the Court of Appeals then supports its structure of inferences by two props of the same material, namely, inferences drawn from the failure of Mammoth Oil Company to call Secretary Fall and Mr. Sinclair as witnesses to deny the charge of bribery (R. 842).

As to Secretary Fall, the Court of Appeals asks:

> "Why is silence the answer of a former cabinet official to the charge of corruption? * * * It is incredible that a former cabinet official in the position of trustee of the public lands for the people of the United States when accused of bribery and corruption in connection with his official duty in matters where great public interests are concerned, would not be quick to refute the same" (R. 842).

Secretary Fall was as available to the Government as a witness as he was to the Mammoth Oil Company. The fact that he did not demand to appear as a witness in an action to which he was not a party to deny a charge of corruption

not made in the Bill is made the basis of an inference against the Mammoth Oil Company. Is it not a more legitimate inference from Secretary Fall's silence under the charge of corruption made in a brief in a case to which he is not a party that, instead of thrusting himself as an interloper and a volunteer witness not called by either party in a controversy between others, he either saw nothing requiring him to so thrust himself in or awaited the time he would be obliged to meet such charge directly?

As to Mr. Sinclair, the Court of Appeals asks:

> "Why is silence the only reply of Sinclair, a man of large business affairs, to the charge of bribing an official of his Government? * * * These gentlemen have the right to remain silent to evade, to refuse to furnish information, and thus to defy the Government to prove its case, but a court of equity has the right to draw reasonable and proper inferences from all the circumstances in the case, and especially from the silence of Secretary Fall, and from the failure of Sinclair to testify. It is not sufficient answer that the Government might have used Sinclair as a witness. He was properly a witness for the defense. If he could not fully have explained the organization of the Continental Trading Company, Ltd. he could at least have placed beyond the realm of dispute the question of whether he was connected therewith, and whether he received any Government bonds as dividends therefrom, or shared in any distribution of its assets" (R. 842 3).

Thus, Mr. Sinclair's failure to take the stand and deny that he was a stockholder in the Continental Trading Company is used by the Court of Appeals as the final and

special ground for the inference that he was such a stockholder, and his silence in respect of the charge of bribery is treated as evidence of the truth of the charge. Where in the record are there proofs shown to have been adduced, tending to fix a liability on Mr. Sinclair in respect of the Continental Trading Company transaction? Where is Mr. Sinclair shown to have had any knowledge of the organization of the Continental Trading Company and of any distribution by it of its assets? Where is Mr. Sinclair shown to have had any knowledge of the Liberty Bonds claimed to have been in the possession of Everhart? In truth the record does not contain a syllable of evidence showing or from which it can be reasonably or legitimately inferred that Mr. Sinclair had knowledge of any of these matters.

We submit that any number of unnatural and illegitimate inferences do not supply proofs tending to fix a liability on a party within the rule that the silence of said party may be considered in weighing such proofs already adduced—that in this case the mere charge made by Government counsel in their brief, referred to and adopted by the Court of Appeals, that Mr. Sinclair bribed Secretary Fall is not something laid at his door for him to deny and disprove or be found guilty.

Having built a structure of inferences to sustain the charge that Mr. Sinclair bribed Secretary Fall and having propped it up by additional inferences drawn from the fact that Secretary Fall and Mr. Sinclair were not called as witnesses for the defense to deny the charge, the Court of Appeals then throws over its fragile creation a cloak of suspicion by drawing the further inference in reference to

the Continental Trading Company transactions in mid-November, 1921, that "while this was prior to the signing of the lease, it is reasonably certain that negotiations were then either being carried on with reference thereto, or were in immediate prospect" (R. 845).

Such inference is not only not drawn from any fact or circumstance in the record but is drawn in the very teeth of uncontradicted evidence that no decision to lease Naval Reserve No. 3 was made until the latter part of January, 1922; that Secretary Fall took no steps whatever to negotiate a lease until he was requested to do so by Secretary Denby through Admiral Robison, and that negotiations for the lease did not commence until February, 1922 (*supra*, pp. 27-8). There is nothing whatever in the record to show that in November, 1921, Mr. Sinclair contemplated a lease of Naval Reserve No. 3 or that he had any intimation that the leasing of the Reserve was then being considered by the Government. Not until December 31st did Mr. Sinclair even broach the subject of a lease.

The Court of Appeals says:

> "That there existed a somewhat intimate relationship between Secretary Fall and Sinclair is apparent. Sinclair visited Fall at his ranch in New Mexico and talked over the matter of the leasing of Teapot Dome. Sinclair's personal attorney drew the lease. Sinclair, at Secretary Fall's suggestion, after the lease was executed, arranged for a prominent newspaper publisher Mr. Shaffer to have some 400 acres of the Teapot Dome lands" (R. 839).

There is nothing in the record to show that Mr. Sinclair was even acquainted with Secretary Fall prior to

December 31, 1921, much less that he was on terms of intimacy with him. There is no evidence that Mr. Sinclair "visited" Secretary Fall. Mr. Sinclair and Mr. Zevely went to Three Rivers, New Mexico on December 31, 1921, for the purpose of discussing with Secretary Fall some business connected with Osage Indian leases. While there an inquiry was made whether Teapot Dome would be leased and Secretary Fall answered that an investigation was being made upon which that would be determined (R. 323). That is the whole of the evidence upon that subject.

It is not true that Mr. Sinclair's personal attorney drew the lease. The first rough draft of the lease was prepared primarily by Mr. Ambrose of the Bureau of Mines (R. 339) and other officials of the Government including Admiral Robison worked on and had a part in the negotiation and preparation of the lease as executed. The Court of Appeals is also in error in saying that after the lease was executed by Mr. Sinclair, Secretary Fall arranged for Mr. Shaffer to have a part of it. We shall discuss the Shaffer matter hereinafter. It affords no possible basis for inference of intimacy between Secretary Fall and Mr. Sinclair.

The crowning inference drawn by the Court of Appeals that Mr. Sinclair had in mind negotiations for a lease of Naval Reserve No. 3 in connection with the Continental Trading Company transaction in November, 1921 and the resulting inference that he participated in the transaction to create a fund to be used for the purpose of giving a bribe not only far overreaches the Record facts but emphasizes the attenuate and ethereal character of the Government's effort to connect the Continental Trading Company Trans-

action with the leasing of Naval Reserve No. 3. Why would Mr. Sinclair, described by the Court of Appeals as "a man of large business affairs", require a scheme to earn a bribe fund? Why imagine, without proof, that in order to obtain such a fund he would engage in a complicated deal to cheat his own company? The whole matter of the alleged connection between the Continental Trading Company, Ltd., transaction and the leasing of Naval Reserve No. 3 is not merely a fanciful creation built out of mere suspicion; it is absurd upon its face.

Additional Inferences from Which the Court of Appeals Drew Its Inferences That Sinclair Received Bonds From Continental Trading Company, Ltd., and Delivered Them to Secretary Fall as a Bribe.

The Court of Appeals concludes its discussion of the question of fraud by saying:

> "Is a court to say that because none testified as to the actual transfer of the bonds that a fatal missing link in the evidence exists? We conclude not. The reasonable, proper and natural inferences and presumptions from the accrual of condemnatory incidents appearing in this record supply the so-called missing links in the testimony and satisfy us of Sinclair's connection with the Continental Trading Company, Ltd., and with the acquisition of the Government Liberty Bonds by Everhart and Secretary Fall. A trail of deceit, falsehood, subterfuge, bad faith and corruption, at times indistinct, but nevertheless discernible, runs through the transactions incident to and surrounding the making of this lease" (R. 847).

In this, the Court of Appeals simply adds to the four basic inferences from which to draw the two final inferences that Mr. Sinclair received Liberty Bonds from the Continental Trading Company, Ltd. and that he delivered bonds to Everhart, a conglomeration of additional inferences. These additional inferences are drawn by the Court of Appeals to arrive at its finding of what it designates as "a trail of deceit, falsehood, subterfuge, bad faith and corruption", and while they are drawn from matters in no way connected with the Continental Trading Company, Ltd., or with Liberty Bonds, they are used as a further basis for the inferences that Sinclair received bonds from the Continental Trading Company, Ltd., and delivered them to Everhart for Secretary Fall.

We believe that we shall show that the Court of Appeals, in drawing these additional inferences, treated as facts from which to draw inferences, things not shown by the record to be facts—indeed, things shown by the record not to be facts; that it drew inferences against petitioners from facts unrelated to the lease or contracts in controversy and from facts with which neither the petitioners nor anyone representing them or any of them had any connection; that it drew sinister inferences from facts and circumstances perfectly lawful and entirely consistent with integrity, both of purpose and conduct; and that in the last analysis it drew such inferences from its own inferred conclusion of bribery.

In discussing these inferences we ask the Court to bear in mind that the evidence of the matters used by the Court of Appeals to draw them was adduced by the Government either in connection with the averments of the bill that the

contracts were without authority of law and were unlawful because made without competitive bidding, or in connection with the averment that Secretary Fall and not Secretary Denby made the contracts, or in connection with the averments of fraud contained in the bill which amounted to no more than that the contracts were made upon an inadequate and improper consideration (*supra*, pp. 10-11).

Although the Court of Appeals does not find that the lease was granted for an inadequate consideration, and although it does not find that the contracts were invalid, either because not authorized by law or because made without competitive bidding, and although it finds that the contracts were the acts of Secretary Denby, it uses evidence introduced in connection with those issues from which to draw inferences as a further basis from which to infer bribery.

Under the heading of fraud, the Court of Appeals, after stating that it has the same right to draw inferences from all the circumstances appearing in the record, as did the trial court, states that it will proceed to "a somewhat extended examination of this record, and attempt to sift from the mass of evidence the important and relative parts" (R. 818).

It may be well to recall and to bear in mind throughout the following discussion that the District Court found no fraud of any kind upon the part of any officer of the Government, and that as to every officer, save and excepting Secretary Fall, the Court of Appeals concurred. Its concurrence is found in the statement by the Court of Appeals of the charge which it adopted and sustained:

> "There is no charge of corruption in this case as to any of the officials of the Government except as to former Secretary of the Interior, Albert B. Fall. It is the theory of the Government, bluntly stated, that Secretary Fall received from Harry F. Sinclair * * *" (R. 816).

(a) The Executive Order.

Although the Court of Appeals concurs in the finding of the District Court that the Executive Order was legal and did not remove the control of the reserves from the Secretary of the Navy in such a way as to violate the Act of June 4, 1920 (R. 815), it finds in the promulgation of the order a fact from which to draw sinister inferences. Although the record shows that the order originated with Secretary Denby (R. 308), against whom no charge of corruption or fraud is made, the Court of Appeals states that whether it originated with Denby or was suggested by Secretary Fall "is a matter of conjecture." It says:

> "It is certain that Secretary Fall was not only willing, but anxious, that such suggestion of Secretary Denby be carried out. He prepared an order for the President to sign. * * * The question of its legality was not submitted to any attorney of the Navy or Interior Department, or the Department of Justice" (R. 819).

There is nothing in the record from which to infer that Secretary Fall was anxious that the Executive Order be made. The Executive Order was prepared, not by Secretary Fall, but by Judge Finney (R. 306, 406-7) who was a lawyer and who had had long experience in the adminis-

tration of the public land laws (R. 300), and against whom no charge of corruption or fraud is made. This was fully seven months prior to any meeting or contact between Secretary Fall and Mr. Sinclair (R. 323). The bill averred that Fall had fraudulently obtained the Executive Order to enable him to deal with Naval Reserve No. 3 to the advantage and profit of Mr. Sinclair (R. 5, 6). In spite of the fact that the Government introduced no evidence to support such a charge, and indeed expressly abandoned the charge at the trial (R. 250), the Court of Appeals by conjecture and in contradiction of record facts, and in violation of such principles of law as were enunciated by this Court in *United States* v. *Chemical Foundation* (*supra*, page 34), seems to find that the promulgation of the Executive Order supports its inferred conclusion of bribery.

(b) The Alleged Dominance of Secretary Fall.

Although the Court of Appeals finds as a fact, in concurrence with the District Court, that enough control was exercised by the Secretary of the Navy through Admiral Robison to preclude it from holding that the power granted by the Act of June 4, 1920, to the Secretary of the Navy, had been assumed by Secretary Fall (R. 815), it draws inferences, some from unrelated facts, some from matters shown by the record not to be facts, and some from facts not in the least supporting such inferences, that Secretary Fall dominated Secretary Denby, Admiral Robison and other Government officers and practically controlled the action of the Navy Department as to the leasing of Teapot Dome (R. 820), all as a further basis for the inference that Sinclair bribed Fall. It states:

"While Admiral Robison represented the Secretary of the Navy and took some part in negotiations leading up to the leasing of Naval Reserve No. 3, he generally coincided with the views of Secretary Fall. After Robison explained them to Secretary Denby, he likewise quite generally acquiesced therein. Secretary Denby was not present at any of the conferences with Sinclair or others in regard to leasing Teapot Dome. So far as he was concerned the idea of opening Teapot Dome as a whole had not been considered or conceived. He never met Sinclair prior to the time of the signing of the lease. His part seemed to consist merely in consenting to the plans and purposes originating with Secretary Fall" (R. 819).

Admiral Robison was appointed by Secretary Denby to take charge of all naval petroleum matters on October 8, 1921 (R. 570-71). Thereafter he acted as Secretary Denby's personal representative in all matters in connection with the reserves (R. 583). He immediately began a study of naval petroleum matters by an examination of the Navy's files and records and by consultations with Commander Stuart who had theretofore had charge of such matters and with Interior Department officials (R. 573-74). The administration of the reserves was the "principal job" that Admiral Robison had; it was but one of Secretary Denby's jobs (R. 585).

It was Admiral Robison against whom no charge of corruption or fraud is made, who first concluded that Naval Reserve No. 3 should be leased, not Secretary Fall, and it was upon his recommendation that Secretary Denby decided to lease the reserve (*supra* p. 28). We have hereto-

fore shown that Admiral Robison had an active part in and maintained supervision over the negotiations which resulted in the lease to Mammoth Oil Company; that he kept Secretary Denby informed of all matters as the negotiations progressed; and that he went over the lease word for word with Secretary Denby before the latter signed it (*supra* pp. 28-9). When Congressman Mondell discussed the lease with Admiral Robison he was impressed with Robison's familiarity with it (R. 395).

In the face of its own statement that "It was proper, of course, for the Secretary of the Navy to act through competent subordinates. Of necessity this must be so" (R. 815), why should the Court of Appeals draw sinister inferences from the fact that Secretary Denby did that very thing? Without regard to the relative parts played by Admiral Robison and Secretary Fall in the matter, might not Secretary Fall, if he was willing to do so, act as a subordinate of Secretary Denby in respect of the naval petroleum reserves at the request of Secretary Denby and with the concurrence of the President, even as Admiral Robison was such a subordinate?

In reference to Secretary Fall, the Court of Appeals says:

> "As early as July, 1921, he wrote Edward L. Doheny referring to the Secretary of the Navy:
>
> "'He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau of his department, but only with himself and such consultation will be confined strictly and entirely to matters of general policy'" (R. 820).

Just preceding the excerpt of the letter quoted by the Court of Appeals, is the following language:

> "There will be no possibility of any further conflict with Navy officials and this Department, as I have notified Secretary Denby, that I should conduct the matter of naval leases under direction of the President without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy" (R. 313).

This letter was written to Mr. Doheny in expressing appreciation of Doheny's action in giving up eight of twenty-two wells leased to him in order that Secretary Fall might effect a settlement with the United Midway Oil Company of an application for compromise and settlement of placer mining claims in Naval Reserve No. 1 made by it under the Act of February 25, 1920. The United Midway application was not a Navy Department matter, either under the Act of February 25, 1920, or the Act of June 4, 1920. In connection with that application, Secretary Fall had had trouble with Commander Stuart of the Navy Department (R. 277). Secretary Fall considered that Stuart had been insulting to him in his own office (R. 603). The letter to Doheny was written by Secretary Fall long before Admiral Robison assumed charge of the naval petroleum reserves and, of course, long prior to any thought of leasing Naval Reserve No. 3.

What Secretary Fall *did* in connection with the negotiation of the Teapot Dome lease in February, March and April, 1922, precludes the drawing of any inference from what he wrote in July, 1921, in reference to an entirely different matter.

The Court of Appeals likewise refers to and quotes a letter dated July 23, 1921 from Secretary Fall to Secretary Denby (R. 799). That letter shows on its face that it had to do only with certain leases already made in the naval reserves in California. It does not refer to any lease in Naval Reserve No. 3 nor does it indicate any intention to make any such lease. Even as to the matters covered by it, it shows Secretary Fall asking the Navy to advise him of its policy and offering his services to consummate such policy, all as contemplated by the Executive Order.

The Court of Appeals also refers in this connection to a letter dated October 25, 1921 from Secretary Denby to Secretary Fall and quotes a single paragraph therefrom:

> "That all leases and contracts, except as provided in paragraph 6, will be arranged and consummated by the Interior Department, copies of same being furnished to the Navy Department as a matter of information and record only" (R. 819).

Referring to that paragraph of the letter, which was paragraph 7, and also to paragraph 6 mentioned in paragraph 7, Admiral Robison, who prepared the letter for Secretary Denby's signature (R. 617), testified:

> "I may say that these paragraphs were not intended to apply at all to Reserve No. 3. At the time this letter was written the development of Naval Petroleum Reserve No. 3 was not contemplated and was distinctively forbidden by paragraph 9, which relates solely to Reserve No. 3, and reads
>
> '9. That the development of Naval Reserve No. 3 is not to be undertaken except to protect the

Government against depletion of the Reserve by other parties.'

The last phrase was put in to provide against future contingencies. We did not know what contingency might arise which would in any way affect the reserve. Paragraph 7 above quoted had reference to leases under the Leasing Act of February 25, 1920, which gave to the Secretary of the Interior control of producing wells within the naval reserve proper. Leases covering those wells were pending, claims were pending for other properties in the reserves, under the old acts that had been in force. Before the 25th of February, 1920, it had been the policy of the two departments to have all leases referred to the Secretary of the Navy prior to their execution by the Secretary of the Interior, leases that were to be granted under this act of the 25th of February, 1920. It was decided, and paragraph 7 was intended, to put into effect the idea that the Secretary of the Interior should make his decisions and to keep us informed of his decisions. We had not anything to do with the decision,—that is the decision with respect to leases under the Act of February 25, 1920. I think paragraph 7 is not very well drawn, but that was the idea of it" (R. 575-6).

The letter of October 25, 1921, with the exception of paragraph 9 thereof, above quoted in Admiral Robison's testimony, shows on its face that it had to do only with the naval reserves in California and plans in connection therewith (R. 281-3).

Paragraph 9 of the letter resulted from the conference between Admiral Robison, Secretary Fall, Dr. Bain and

Mr. Ambrose held about October 23, 1921, as we have hereinbefore shown (*supra*, pp. 23-5), primarily in respect of the California reserves, but at which it was decided in respect of Naval Reserve No. 3 that the data Dr. Bain and Mr. Ambrose had seen in Denver early in September, taken in connection with the Wegemann Report submitted in the latter part of September, required an investigation and study of the question of drainage.

The Court of Appeals stresses the above mentioned letters of July 8, 1921, July 23, 1921 and October 25, 1921, all of which were written long before the decision to lease Teapot Dome was made, but does not point to a single instance showing, or from which it might be inferred, that Secretary Fall attempted to dominate Secretary Denby or Admiral Robison *in the making of the Teapot Dome lease itself*. But why discuss scraps of evidence purporting to show that Secretary Denby did not in effect operate as required by the Act of June 4, 1920? The Court of Appeals itself has considered all of this evidence with other evidence in the case and has concurred with the District Court in finding that Secretary Denby did perform as required by the Act. If he did, how can these letters be used as evidence that Sinclair bribed Fall?

The Court of Appeals further states:

> "With the Secretary of the Interior rested the right under the lease to suspend operations temporarily under the law; to consent to a termination of the lease or an assignment thereof, to place the value on gas and casinghead gasoline. Practically all discretionary power under the lease was vested in Fall" (R. 820).

The Court will see from the terms of the lease itself that the really important discretionary powers under it were not delegated to Secretary Fall but were vested in the lessor, the United States of America. See also testimony of Admiral Robison (R. 650-1). As to the matters that were delegated to Secretary Fall in the provisions of the lease referred to by the Court of Appeals, Admiral Robison testified:

> "The possible assignment of this contract was discussed with Denby. I told him that I thought the general position of the Secretary of the Interior regarding the Naval Reserve property at all times was that of a subordinate to himself * * *, that the actions of the Secretary of the Interior were controllable by the Secretary of the Navy so far as Naval Petroleum Reserve matters were concerned, except, of course, those particular matters specifically given to the Secretary of the Interior by the law" (R. 634).
>
> "If we could have secured no degree of co-operation from the Interior Department we would have been in trouble, but I didn't count on any complete breakdown of any Department of the Government" (R. 636).

(c) The Question of Drainage.

Both the District Court and the Court of Appeals construed the purpose and policy of the Act of June 4, 1920 to be in accordance with what seems to us the view of this Court to the extent announced in the recent case of *Pan American Petroleum & Transport Co.* v. *United States*, decided February 28, 1927.

The District Court said:

> "Lying adjacent to the great Salt Creek field where the leases were being granted by the hundred, or about to be, Congress realized, judging by the text of the Act of June 4th, that there was danger on account of this intense leasing, of drainage and a loss in the naval reserves themselves, and in consequence passed the act as a remedial measure for the purpose of taking the oil out if found necessary to save it" (R. 269).

The language of the Court of Appeals is:

> "The purpose of the Act of June 4, 1920, was to preserve the oil in these naval reserves for the benefit of the Government in such manner as Congress at that time deemed wise, viz., to place the matter almost exclusively in the hands of the Secretary of the Navy. It is of vital importance that the Government's oil in these reserves shall not be drained away for the benefit of private enterprise, but that it shall be preserved in the interest of national defense" (R. 811). • • •
>
> "• • • If he shall determine that the oil cannot be properly conserved within the ground, then he has the right to develop, use and operate the properties directly or by contract, lease or otherwise" (R. 812).

With that view of the statute, the sole question left to the District Court and the Court of Appeals to decide was: **Was Secretary Denby's decision that there was danger of drainage arbitrary or capricious or wholly unsupported by evidence?** *Silberschein v. United States*, 266 U. S., 221.

This is a question of fact and upon it the Court of Appeals concurred with the District Court in finding that the lease to the Mammoth Oil Company was within the authority of the Act of June 4.

Despite such concurrence and its construction of the Act of June 4, the Court of Appeals found in connection with the question of drainage, matters from which to draw inferences that Sinclair bribed Fall. In its discussion of the subject, that court conjectures happenings at convenient places in the chronology of events and the conjectured happenings constitute the chief basis for the sinister inferences drawn by it; it also misplaces events in the chronology and by reason of such misplacing, finds grounds for sinister inferences; again it omits from the chronology important happenings and through this omission draws sinister inferences which it otherwise could not draw.

Referring to Secretary Fall's trip to the Pacific coast, which lasted from July 31st to October 4th, 1921, which is shown by the record to have had no connection with any matter pertaining to Naval Reserve No. 3 (R. 669; 281), the Court of Appeals says:

> "The record does not show whether or not Fall met Sinclair in the West, but it is significant that upon his return the question of drainage in Teapot Dome, and the danger therefrom were again agitated. This had been considered prior thereto by some of the Government officials and a report had been made thereon by one Carroll H. Wegemann, at that time connected with the Department of the Interior" (R. 821).

Although the record does not contain a syllable of evidence upon which to base an inference that Mr. Sinclair met or even knew Secretary Fall prior to December 31st, 1921, the Court of Appeals conjectures that Secretary Fall saw Mr. Sinclair on his trip west.

Furthermore, the question of drainage in Teapot Dome originated, so far as Government officials are concerned, not with Secretary Fall, but with Director Bain and Chief Petroleum Technologist Ambrose of the Bureau of Mines (against neither of whom is any complaint made) while Secretary Fall was on his trip, as we have hereinbefore shown (*supra* pp. 21-3), and it was not as stated by the Court of Appeals "again agitated" for the reason it had never been agitated before.

Secretary Fall returned to Washington on October 4th, 1921 (R. 669), but no question of drainage of Teapot Dome was raised until Dr. Bain and Mr. Ambrose returned on October 23rd, 1921 (R. 663). As shown hereinbefore (*supra* pp. 23-5), at a conference held about that date, primarily in respect of Reserves Nos. 1 and 2, there was a general discussion of drainage and its causes (R. 663) and Dr. Bain and Mr. Ambrose stated what they had learned in Denver as to Reserve No. 3 (R. 664). It was determined at the conference that the data which Dr. Bain and Mr. Ambrose had seen in Denver, taken in connection with the Wegemann report, warranted a further investigation and the representatives of the Bureau of Mines were instructed to make a study of the matter (R. 665).

The Court of Appeals proceeds:

> "As a result of conferences it was decided to send some one to make an examination as to the question

> of drainage, and through the Bureau of Geological Survey one K. C. Heald was selected therefor. His report indicated no immediate danger of drainage. After this no one in the Geological Survey was further consulted on the subject. Director H. Foster Bain of the Bureau of Mines, and also Arthur W. Ambrose, Chief Petroleum Technologist of the Bureau of Mines, likewise gave some attention to the matter. They made a trip to the West and consulted with C. A. Fisher, a Geologist, and also with Carroll H. Wegemann, who was then out of Government service" (R. 821).

The trip of Dr. Bain and Mr. Ambrose is thus misplaced as to time and their part in the question of drainage is made to appear unimportant and insignificant as compared to that of Heald. As we have hereinbefore shown (*supra* pp. 25-8), Heald had and performed one function, and Dr. Bain and Ambrose had and performed an entirely separate function, one of much greater importance than Heald's.

In the face of the record facts, which we fully reviewed in the statement of events leading to the decision to lease Naval Reserve No. 3 (*supra*, pp. 20-8), and which are nowhere contradicted, showing the prominent parts played by Dr. Bain and Ambrose in the matter of drainage and showing the minor part played by Secretary Fall in the matter and in the decision to lease Teapot Dome, the Court of Appeals infers that drainage was found acute only after Fall returned from Three Rivers where he was "visited" by Sinclair.

The Court of Appeals impliedly finds much to criticize in Admiral Robison's acceptance of the advice of Dr. Bain

and Mr. Ambrose as to drainage and construes the Heald report as indicating no immediate danger of drainage, and in that connection seems to think it noteworthy that after the Heald report no one in the Geological Survey was further consulted on the subject.

Heald's report had confirmed Wegemann's correction of the position of the saddle and had stated that instead of two separate domes in the Teapot structure it was probable there was a single faulted dome (R. 318). He reported "that quite a bit of the reserve was liable to be drained" (R. 319), but recommended that leasing be limited to certain specified sections of the reserve (R. 112). The confirmation of the Wegemann report was the only significance Admiral Robison attached to the Heald report (R. 605). Mr. Heald was a geologist, not a petroleum engineer; he did not have the data later collected and studied by Dr. Bain and Mr. Ambrose and upon which they based their conclusions as to drainage. His report did not indicate he had given any consideration to the question whether the saddle contained oil or water or to any question of depletion through loss of gas pressure. His testimony shows that he did not consider those questions but that he concerned himself merely with checking certain outcroppings of bentonite that showed a dip at a particular point sufficient to confirm Wegemann's data (R. 319, 323). Indeed, having spent only four hours on the land (R. 319), how could he have had time for anything more, even if he had been qualified to report on other factors that enter into the question of drainage?

On his cross-examination Admiral Robison frankly stated that he had not consulted Dr. George Otis Smith or

others of the Geological Survey because he attached more value to Dr. Bain's opinion on the question (R. 606). He further testified on cross examination by the Government:

> "I set great store by geologist's reports but I do not think they have much value after mining operations begin. For instance, at the time Teapot Dome was set aside, when the development of Salt Creek was small comparatively, the Teapot Dome reserve had its area delimited, and I think properly, by geologists. After it was opened the question of drainage of Teapot Dome into Salt Creek was one that became acute as a result of actual mining operations in the Salt Creek region, and the geologist's opinion no longer was of the tithe of the value of the opinion of the mining engineer in my opinion. Dr. Bain gave me an opinion on this subject, but in basing my decision on his opinion I did not look into his oil experience. I did not know that he had no oil experience before he came with the Government. I knew he was Director of the Bureau of Mines in the Interior Department and Chief Technical Mining Expert of the country. I conceived him, and do conceive him to be the best possible authority that I have access to" (R. 644).

The sentence in the above quotation to the effect that Admiral Robison did not know that Dr. Bain had no oil experience before he came to the Government was based, in making the abstract of the record, upon the language used by the cross-examiner in his question. As a matter of fact, while Dr. Bain testified that he was never "an oil expert in a special oil practice" (R. 658), he had had long experience before entering the government service on Jan-

uary 1, 1921 in matters connected with the development of oil fields, "methods of technology and things of that sort" (R. 657).

Moreover, the Bureau of Mines had the benefit of the knowledge and experience of experts and specialists, employed by it, who had devoted a great deal of time and thought to and had done much experimental and research work in connection with drainage problems—the presence of water in sands, gas pressure, etc. (R. 660-2).

Dr. Bain likewise stated that the Bureau of Mines did not consult the Geological Survey because he considered that the question was within their own field (R. 697). Though Heald assumed to specify sections of the reserve to be leased, his testimony shows that he did not even know just what lands the reserve included and his report contains numerous errors in that respect (R. 319).

Subsequent events proved that Admiral Robison was wise in his choice of advisors. The biggest wells that came in on the Naval Reserve were in that part which Heald in his report stated must be regarded as one of the poorest portions (R. 667).

Dr. Bain in a memorandum dated March 24, 1922, shows in respect of several typical oil fields that serious losses in ultimate yield of an oil property result from delay in drilling up the property while adjacent properties are being drilled and that the nearer the wells are to the land being drained, the greater the loss (R. 679-83). In another memorandum of the same date he shows how much the Navy had lost in Naval Reserve No. 2 in California from inability to drill wells therein prior to the passage of the Act of February 25, 1920, and how much it had lost

in royalty oil from both California reserves by delay in drilling offset wells prior to March 4, 1921 (R. 677-79). The subject matter of these memoranda had been discussed prior thereto (R. 683) and Admiral Robison believed the Navy had suffered a loss of several millions of dollars by delaying too long in putting down offset wells in California (R. 645).

The Court of Appeals proceeds:

> "After Fall's return in January from his home in New Mexico, where he was visited by Sinclair and his counsel, Col. Zevely, the drainage question was again taken up and it was concluded that it was acute. Secretary Denby under Robison's presentation of the question finally became convinced and agreed to the development of Teapot Dome as a whole" (R. 821-2).

When the Court of Appeals here says that the drainage question was *again* taken up, it is unmindful of the sequence of events clearly disclosed by the record. The question had been taken up at the October 23, 1921 conference (*supra*, p. 23). It was taken up, not at the instance of Secretary Fall but at the suggestion of Dr. Bain and Mr. Ambrose, neither of whom is charged with corruption or fraud and both of whom testified as to the manner in which the question originated (Bain R. 662; Ambrose R. 702). Having been taken up at that time, the question had not thereafter been dropped but Dr. Bain and Mr. Ambrose were directed to investigate, study and report on the matter (*supra*, p. 24). Pursuant thereto Mr. Ambrose collected data and made a detailed study (R. 703) and dis-

cussed his data fully with Dr. Bain (R. 665; 692-3). Secretary Fall was absent from Washington from December 1, 1921 to January 27, 1922 (R. 298). Before he returned Dr. Bain and Mr. Ambrose had reached their conclusion (R. 665; 692-3) and upon his return were ready to report. In view of this perfectly natural chain of events, why seek a sinister inference from the circumstance that Mr. Sinclair saw Secretary Fall in Three Rivers, New Mexico, on December 31, 1921? Not until that date did Mr. Sinclair know that an investigation of drainage was being made. As we have seen, Mr. Sinclair had gone with his counsel to Three Rivers to see Secretary Fall on business connected with Osage Indian leases and while there had made an inquiry as to whether Teapot Dome would be leased, to which Secretary Fall replied, in accordance with the facts as shown by the record, that an investigation was being made upon which the matter would be determined (R. 323). Neither before nor after Mr. Sinclair's trip to Three Rivers, does the record show that Secretary Fall attempted to interfere with or influence Dr. Bain and Mr. Ambrose in their investigation of the subject of drainage or their conclusions thereon. Moreover, after they reported to Admiral Robison and Secretary Fall their conclusions on the subject at the conference held late in January, Secretary Fall did not assume or attempt to tell Admiral Robison what to do, but asked "What are you going to do about it?" (R. 645). And as indicated in the language of the Court of Appeals last above quoted, Secretary Denby decided to lease Reserve No. 3 upon presentation of the question of drainage, not by Secretary Fall but by Admiral Robison who is not charged with corruption or fraud but

who this record clearly shows, is the officer of the Government responsible for the conclusion that Teapot Dome should be leased and for taking that conclusion to Secretary Denby for decision.

The Court of Appeals goes on to say as to drainage:

> "That there was remote danger of drainage of a portion of Teapot Dome by virtue of leases in the adjacent Salt Creek field is apparent from the record. However, the evidence clearly establishes that there was no immediate danger, and no need for haste. The drainage danger was unquestionably not imminent enough to force immediate action in the leasing of the entire property. It was a matter of five years or more, according to some of the testimony. At no time was the oil in the first Wall Creek sand, estimated to contain between fifty and fifty-one million barrels of oil, in danger of drainage" (R. 822).

Fear of drainage of the first Wall Creek sand played no part whatever in the decision to lease Teapot Dome. The drainage question raised and discussed was entirely in respect of the second Wall Creek sand (R. 691) which was estimated to contain approximately eighty-five million barrels of oil (R. 338). There was, of course, no way to reach the second Wall Creek sand without drilling through the first.

As to the second sand, Dr. Bain and Mr. Ambrose advised Admiral Robison that the reserve was subject to drainage and that it would become more so as time went on, that they could not tell how far the drainage would extend and could not be positive that it would not extend indefi-

nitely (R. 665-6). Thereupon, Admiral Robison determined to take no chance of losing oil by delaying development and to recommend the leasing of the reserve because, as he stated to Secretary Denby, "Complete protection of our property could be secured with certainty only by complete development" (R. 584).

In its statement that "it was a matter of five years or more, according to some of the testimony," the Court of Appeals refers to the *end* of drainage. What Admiral Robison was seeking to guard against was the very beginning of any loss of the Navy's oil.

The Court of Appeals continues:

> "It was not until the full scheme of development of the entire reserve, with its attendant features, was suggested and became visualized, that these fears of drainage became acute" (R. 822).

When in the latter part of October, 1921, the Navy determined upon certain projects in respect of the California Reserves, it was expressly stated in the so-called policy letter of October 25:

> "That the development of Naval Petroleum Reserve No. 3 is not to be undertaken except to protect the Government against depletion of the reserve by other parties" (R. 282, par. 9 of the letter of October 25, 1921).

There is not a syllable of evidence in the record that "the full scheme of development of the entire reserve, with its attendant features" was suggested or became visualized prior to the conference held late in January when it was

determined by Admiral Robison that the reserve should be leased to protect the Government against depletion and loss.

Admiral Robison expressly stated on his cross-examination by the Government that it was only after he became aware of the probability of drainage of Teapot Dome that he thought the Navy was justified in opening up that reserve (R. 646). But having concluded to lease the entire reserve to make complete protection certain (R. 584), Admiral Robison decided that the lease would be made to one party in order to secure certain features which would insure to the Government that the development of the reserve would be for the use or benefit of the Navy as contemplated by the order creating the reserve.

(d) The Supposed Celerity of Sinclair's Proposition of February 3d, 1922.

The Court of Appeals proceeds:

> "On February 3, 1922, Sinclair and Zevely were at Secretary Fall's office. Robison was called in and requested to present the demands of the Navy in a lease of Teapot Dome. He did so, covering the question of a pipe line and of storage facilities to be constructed in exchange for royalty oil. Something was said concerning oil certificates in lieu of cash to avoid covering the cash into the Treasury of the United States. It is significant that after this meeting, *and on the very same day*, Sinclair submitted a complex, tentative proposition, setting forth the terms and conditions upon which he would undertake the development of Teapot Dome, etc." (Italics supplied) (R. 822).

In this the Court of Appeals finds significance in a matter shown by the record not to be a fact. The truth is that the "demands of the Navy" were explained to Mr. Sinclair by Admiral Robison in the latter part of January, subsequent to January 27th but "about four days prior" to the submission of his proposition (R. 589, 612). This is the only evidence on the subject. "About four days" was abundant time for Sinclair to prepare his "complex" proposition, which was in the form of a letter barely over two pages in length, and which was a mere tentative general outline of a basis for negotiations (R. 324-26) along the lines Admiral Robison had stated as the requirements of the Navy (R. 612-13).

(e) The Matter of the Pioneer and Belgo Claims.

Under the Act of June 4, 1920, the Secretary of the Navy could not lease any lands in the naval reserves which were embraced in pending applications for lease under the Act of February 25, 1920. Of such applications the Secretary of the Interior had jurisdiction.

In connection with the general investigation as to the danger of drainage in Naval Reserve No. 3, pursuant to the conference between Admiral Robison and Interior Department officials held in late October, 1921, Secretary Fall instituted an inquiry as to pending applications for leases on Naval Reserve No. 3 (R. 329).

It developed that the Pioneer Oil and Refining Company was in possession of a large portion of the reserve, claiming that possession by reason of location and discovery of oil under the placer mining laws, and by virtue thereof

had made four applications for leases under Section 18 of the Act of February 25, 1920, covering three quarter sections in Section 3 and one quarter section in Section 10 of Township 38 North, Range 78 West, and an application for compromise under Section 18a of the Act of February 25 covering many additional tracts in the reserve (R. 330-1).

Roy W. Tallman, an employee of the General Land Office, who prepared a report on the Pioneer applications for leases, based on other reports he found in the General Land Office (R. 333, 335), stated in his report that they had been rejected and the cases closed (R. 330-1) but Secretary Finney testified that the applicants had filed a petition asking for the exercise of supervisory authority by the Secretary; that he had set the petition down for hearing in September, 1921, but prior to that time advised attorneys for the applicants that the hearing before him would not be held but would be held before Secretary Fall at some later convenient date (R. 303). The matter rested in that situation (R. 303) and therefore the Pioneer's applications for leases were pending when the Navy decided in January, 1922, to lease the reserve.

Said applications had been denied originally by Secretary Payne on the ground that the wells were not "discoveries" (within the meaning of that term as applied by the Interior Department) and Finney, apparently on the same ground, expressed his opinion to Fall that the claims for leases had no authority (R. 286). Tallman's report expressed the same opinion (R. 329-32). This report was introduced in evidence, not as proof of the matters contained therein, but simply as showing what information

went to Secretary Fall (R. 329). Tallman testified that all his report contained was compilation from the reports of others; so far as he was concerned, all of it was hearsay (R. 336) except that he was on the lands in 1920 and saw some wells there and a tank with some oil in it. He did not know one way or the other whether the claims had been continuously possessed from the date of their location until the wells were drilled (R. 335). Tallman in his report, transmitted another report made by Glenn B. Morgan which was similarly offered, not as substantive evidence of what it contained, but as showing information going to Secretary Fall (R. 292-3). While Morgan's conclusions were that there were no valid titles to lands in the reserves (R. 297), he stated:

> "* * * yet it is also true that this company" (naming a predecessor in interest of the Pioneer Oil Company) "has established itself upon the Naval Reserve, and has expended large sums thereon and it is likewise a matter of common knowledge that the said outfit intends to remain in possession and control until ejected by the courts or until the land titles are finally adjudicated.
>
> "2. Although no application for patent has so far been submitted for lands in the Reserve by this or any other claimant, it would be folly to assume that they would not attempt to set up early discoveries as the basis for their claims (R. 294).

Morgan's report was made July 26, 1917 in connection with the validity of titles under the placer mining law, long before the Act of February 25, 1920, with its relief and

compromise provisions for the benefit of claimants who could not establish *in the General Land Office* their absolute right to titles.

Secretary Fall did not, as averred in the bill, express a belief that the Pioneer and Belgo claims were worthless. On the contrary he told Gerald Hughes that he had always had serious doubt as to whether Secretary Payne's ruling on the applications for leases was correct; that at any rate it was up before him again and he believed there was considerable equity in the claims and that undoubtedly the people that held them would want to go to court and he thought it was better to clean them up (R. 714-15).

The Court of Appeals states roundly:

> "It was the Government's business to dispose of" the claims of the Pioneer and Belgo Companies (R. 823).

In this the Court of Appeals was in error both of fact and law. The Court confuses the two separate and distinct claims of right on the part of the Pioneer and Belgo. Stated inversely in the order of time:

First, the Pioneer Company had made applications for leases under the Act of February 25, 1920; and

Second, in addition to such rights as the Pioneer Company had under its applications for leases, the Pioneer and Belgo companies were in possession of the land and claiming that possession by reason of location and discovery of oil. This is made entirely clear by the report of Glenn B. Morgan introduced by the Government (R. 292-298, especially 293).

Judge Finney on the same matter, testifying for the Government, states that:

> "There were three or four oil wells drilled on top of the structure by the Pioneer, I think, and they had applied for a lease, basing that on these wells. The application would be under the Act of February 25, 1920, *but they based their claim on alleged prior location*,—the Belgo titles as we called them" (italics supplied) (R. 286).

It will be remembered that the Act of February 25, 1920, provided that "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated * * * may be perfected under such laws, including discovery" (41 U. S. Stat. L., 451, Sec. 37).

The Secretary of the Interior might indeed have set down for hearing the applications made by the Pioneer for preferential leases under the Act of February 25, 1920, and upon such hearing have disposed of the applications, but such action would not at all have affected the claims of the Pioneer to rights in the land growing out of its prior locations. And that they were asserting such rights is shown not only by the above testimony of Judge Finney, but also by the Morgan report itself mentioned by the Court of Appeals.

The report points out that owing to the situation on the ground, there will be great difficulty in disproving claims of discovery. The report recommends that suit be brought against the claimants in the Federal District Court (R., 297). Such a suit would require months, perhaps years,

for its final determination. To carry out what the Court of Appeals speaks of as "the Government's business to dispose of the claims", the Government would either be required to bring such a suit as recommended or to wait until such time, near or remote, often many years, often never, when the claimants might choose to apply for patent. In relation to such application for patent, if the discovery of oil, as shown by Secretary Finney—and the discovery, as shown by Mr. Tallman, of oil sufficient to fill a tank twenty-five feet in diameter to a depth of three feet—should not prove sufficient discovery,—the Act of February 25th authorized the Pioneer and Belgo Companies to complete their locations "including discovery". They could, therefore, do such drilling as would discover oil in commercial quantities if that should be required in an application for patent. The Land Department of the Government had long been familiar with the delays and difficulties in such matters, and in the case of the lands here in controversy, with the evidence of drainage and threatened drainage that was laid before the Secretary of the Navy and the Secretary of the Interior, the only way to promptly and effectively protect the Government was the method chosen, viz., the method of requiring titles to be so cleared that the lessee could go on without molestation in taking out the oil and paying to the Government its proper portion thereof. Owing to the difficulties and delays of any other course, it had been usual in the Interior Department to require quitclaim deeds before granting leases (R., 303).

The Court of Appeals infers that Secretary Fall used the Pioneer and Belgo claims as "instrumentalities to prevent a square deal" (R. 823). It says:

> "Of course, making the acquisition of these claims a prerequisite of any lease, when Sinclair either had them or was in a preferred position to secure them, was a fraud as to other bidders, and in its effect removed them from the status of qualified applicants" (R. 823).

In this the Court of Appeals apparently accepts as proven, the averment of the bill that Secretary Fall secretly advised Mr. Sinclair to acquire the Pioneer and Belgo claims and *after* Mr. Sinclair had done so, made the obtaining of the claims a condition precedent to receiving any offer for a lease from any other person (R. 9). There is not a syllable of evidence to support such an averment and the inferences as to the matter drawn by the Court of Appeals are in contradiction of the record. The true facts are as follows:

Sinclair in his tentative proposal of February 3, 1922, had offered to "undertake to quiet all outstanding claimants' titles on this Reserve No. 3, thereby enabling the Government to make a contract now which will be free from controversy", it being his "understanding that existing outstanding claims have as great merit as some of those by reason of which the department has recognized equities and granted rights" (R. 325). Not until March 10, 1922, five weeks after Mr. Sinclair had offered to quiet all claims, did he acquire the Pioneer claims (R. 345), and then he acquired them only conditionally. The Government offered no evidence whatever tending even remotely to show that Secretary Fall had anything to do with Sinclair's acquisition of the claims from Pioneer. The Pioneer

Company had itself contemplated applying for a lease of the reserve under the Act of June 4 (R. 345) but when on or about March 8, 1922, it found that its bid could not be made high enough to meet Sinclair's bid (R. 347), it entered into negotiations for the sale of its claims to the Mammoth Oil Company. A contract was made whereby Pioneer agreed to relinquish its claims to Mammoth and Mammoth agreed "in the event it shall secure a lease upon said lands", to pay to the Pioneer Company two hundred thousand dollars represented by a note for eighteen months, and eight hundred thousand dollars in addition thereto out of one-third of the gross production of oil from the lands.

The Pioneer and Belgo Companies then gave quitclaim deeds to the Mammoth Oil Company and Mammoth in turn gave a quitclaim deed to the United States (R. 344), attaching all the deeds to its formal application for lease (R. 343).

The quitclaim deeds given by the Belgo and Pioneer Companies were made in the same way that the Mammoth Oil Company made its quitclaim deed to the Government, to be returned in case not used, and the contract and conveyances were conditional, the condition being that if Mammoth did not get a lease, the conveyance would be returned (R. 347).

That was the understanding that Mr. Beaty of The Texas Company had in respect of the matter. He felt that if his company should obtain a lease, it could acquire the Pioneer claims and he so stated to Secretary Fall. The conditional relinquishment of the Pioneer claims to Sinclair was not an obstacle to his bidding (R. 349-50, 353) and there is no evidence that anyone else was precluded

from bidding because of Sinclair's conditional acquisition of such claims.

Indeed, the Court of Appeals in one paragraph finds that the Pioneer and Belgo companies "made an optional sale to Sinclair contingent upon his obtaining the lease" (R. 822) and then in the second succeeding paragraph asserts in the face of its first finding, that "it clearly appears that Sinclair was in a position of advantage by reason of the assignment to him of the placer mining claims which Secretary Fall made a condition precedent to leasing" (R. 823).

(f) The Alleged Exclusion of Other Bidders.

The Court of Appeals, though it concurs in the findings of the District Court that advertisement and competitive bidding were not required by the law and impliedly at least that the lease was advantageous in its terms to the United States, draws inferences against the Mammoth Oil Company from Secretary Fall's treatment of others desirous of obtaining a lease.

The bill of complaint averred that the Texas Company, the Pioneer Oil Company, Edward L. Doheny, Leo. A. Stack, and other persons and corporations of standing and responsibility, were desirous of obtaining a lease but were denied an opportunity to do so by Secretary Fall, with the knowledge of Mr. Sinclair who was conspiring with Secretary Fall to that end.

There was no evidence whatever in connection with the latter part of the averment that Mr. Sinclair had any knowledge of any alleged denial by Secretary Fall of the

right of others to bid or that he was conspiring with Secretary Fall to that end.

As to others who, as the bill alleges, desired to bid but were denied that right by Secretary Fall, the evidence is as follows:

The Texas Company.

On March 31, 1922, Amos L. Beaty, President of The Texas Company, conferred with Secretary Fall in reference to a lease of Naval Reserve No. 3 (R. 348). Secretary Fall informed him that he had a satisfactory proposition from Sinclair but would be glad to have The Texas Company also submit a proposition (R. 348-9). Beaty stated to him the substance of what his company would be willing to do as to royalties and exchange of fuel oil for crude oil (R. 349).

Secretary Fall discussed Beaty's proposal with Dr. Bain and Ambrose (R. 667) and Bain and Ambrose compared the royalties offered by Beaty with those offered by Sinclair and it was their judgment that the Sinclair royalties would bring in more to the Government because they were higher on everything above one hundred barrels and at that time they were confident of getting large wells on the naval reserve (R. 668).

The ratio of exchange of fuel oil for crude oil offered by Beaty was the same as that offered by Sinclair for fuel oil delivered at Norfolk, Virginia, and all Atlantic ports north of Norfolk. For Atlantic ports south of Norfolk, Beaty's proposal was one-eighth of a barrel more of fuel oil (R. 28, 349). But Bain and Ambrose, on the basis of their expecta-

tion as to the size of wells in Teapot Dome thought the Navy would get more fuel oil from the higher Sinclair royalties even at the lower ratio of exchange (R. 700). Secretary Fall also discussed Beaty's proposal with Admiral Robison who thought it inferior to Sinclair's proposal (R. 643, 652-3).

Moreover, the Mammoth contract permitted the Government to receive cash for its royalty oils, in which case the amount of royalties was the sole question. And besides, it should be remembered that the contract for the disposition of the royalty oils as contained in the instrument of April 7, 1922, here in controversy, provides that the Government shall receive mid-continent prices for its royalty oils, which were not less than sixty cents per barrel higher than the prices prevailing in Wyoming (*supra*, p. 36) and that Mr. Beaty's proposition for The Texas Company contained no offer to pay mid-continent prices.

The Pioneer Oil Company.

This company never made any application for a lease of Naval Reserve No. 3 under the Act of June 4, 1920 (R. 345). The secretary of the Company went to Washington on March 8, 1922, with data looking toward a proposal for a lease but he learned when he got to Washington that the bid his company was prepared to make was less favorable to the Government than the bid which had been made by Mammoth Oil Company and for that reason the bid was not submitted (R. 347).

Edward L. Doheny.

The evidence is that Edward L. Doheny of the Pan American Company had made up his mind that Naval Reserve No. 3 was entirely out of his field of operations and that he did not desire to bid for a lease on that reserve (R. 616).

Leo A. Stack.

The Government introduced no evidence that Stack ever made or desired to make an application for a lease of Naval Reserve No. 3.

James C. Crawford.

Crawford, a lawyer, called upon Secretary Fall in February, 1922, to ask if there was any possibility of Teapot Dome being leased. Secretary Fall told him that the reserve was to be developed but that he was not going to offer it publicly because he did not want to be embarrassed by a lot of irresponsible oil companies and individuals applying for a lease. As a result of this Crawford communicated with his associates and they talked with officers of The Texas Company which led to Beaty's conference with Fall (R. 402).

Texas Pacific Coal and Oil Company.

Birch Helms, an officer of this company, called on Secretary Fall about April 10, 1922, and discussed a lease of Teapot Dome (R. 382); also the sale of the royalty oil from the Salt Creek field (R. 387). Secretary Fall practically told him that he would entertain a bid (R. 383) but what

Fall had in mind was a bid on the royalty oil from Salt Creek, not a lease of Teapot Dome (R. 387). He told Helms something of the Sinclair proposition but did not say that a contract had been signed with Sinclair and Helms refrained from asking him whether or not that were true (R. 383).

Producers and Refiners Corporation.

Frank E. Kistler, an officer of this corporation, called upon Secretary Fall in March, 1922 (R. 356), and proposed to lease six hundred forty acres on each of the two geological structures embraced in the reserve, at a royalty of twenty-five per cent. Secretary Fall told him that he was not ready to consider leasing the Teapot Dome Reserve at that time and could not consider his proposition, but would give him a chance to bid if he did decide to lease (R. 356).

James G. Darden.

Darden called on Secretary Fall in the latter part of March, 1922 (R. 401). He had heard that Teapot Dome was to be leased. Secretary Fall told him that it was to be leased. Darden made no application for a lease under the Act of June 4, 1920, but claimed title to a placer mining location of one hundred sixty acres which he had acquired in 1920 (R. 400-1). Fall told him that his title was not valid but that Sinclair would settle with him if he had a claim as he had agreed to settle with all claimants. Darden told Fall that he would not take the matter up with Sinclair. Darden later attempted to assert the title and brought suit with reference to it (R. 401).

Referring to the Texas Company, the Texas Pacific Coal & Oil Company, and the Producers and Refiners Corporation, the Court of Appeals concedes that "the propositions of these various companies were not comprehensive, and were more or less fragmentary and unsatisfactory" (R. 823) but goes on to say:

> "It is obvious that disclosures to these companies of the entire plans relating to Teapot Dome were studiously avoided. Various statements were made to them that the Department had reached no decision; that the matter would later be discussed; that they would be advised when the Department was ready to act, and their attention was called to the Salt Creek Field and activities there invited. There was an utter lack of good faith in the matter" (R. 823).

The evidence shows that the Texas Company was not denied the right to bid and was not in any way hindered from bidding but that its bid was not accepted because in the opinion of Admiral Robison and Dr. Bain it was less favorable to the Government than Sinclair's bid on the basic proposition of royalties (*supra*, pages 35-6).

As to the Texas Pacific Coal & Oil Company, the misunderstanding between Secretary Fall and Mr. Helms as to what the latter desired to bid on, explains the matter, especially in view of the fact that the conversation between them occurred on April 10th, after Secretary Fall had signed and had submitted to Secretary Denby the lease in controversy.

The Producers and Refiners Corporation proposition speaks for itself and answers any question that might be asked as to why Secretary Fall disregarded it.

(g) The Shaffer Matter.

The Court of Appeals states:

> "Shaffer, a newspaper man of prominence, apparently received different treatment. He made claim that he was entitled to certain acreage in Teapot Dome, and filed a written application. Secretary Fall's influence with Sinclair was such that Sinclair offered, at Fall's request, to take care of Shaffer, not, however, to the full extent demanded. Just why Secretary Fall should interest himself in Shaffer's alleged claim which had no legal basis, is not clear, but it shows the close connection between Fall and Sinclair" (R. 823-4).

And again, as a basis for inference that there was an intimate relationship between Secretary Fall and Mr. Sinclair, the Court says:

> "Sinclair, at Secretary Fall's suggestion, after the lease was executed, arranged for a prominent newspaper publisher, Mr. Shaffer, to have some four hundred acres of the Teapot Dome lands" (R. 829).

The record facts as to Shaffer are that he already had in the name of Maryland Oil Company forty acres of land in Section 33 adjoining the naval reserve (the rest of the section being embraced in the reserve) and in addition had lands running along the border of the reserve for a mile

and a half, and had expended one hundred fifteen thousand dollars for development but unsuccessfully. By reason of this he felt that he had some preferred right of a lease of the remaining six hundred acres of Section 33 which laid in the reserve (R. 381).

In May and June, 1921, he applied for a lease of said six hundred acres (R. 359-63). At that time he was told that the reserve was not being offered for development but if it was later determined to lease the reserve, his application would be considered (R. 363). All of this was before Secretary Denby determined to lease the reserve.

On March 20, 1922, Shaffer had an interview with Secretary Fall who informed him that negotiations were being had with Mr. Sinclair for a lease (R. 365). Shaffer reminded Secretary Fall of his application and the Secretary told him that he had told Sinclair about the application and wanted him to reserve two hundred acres for Shaffer and he advised him, Shaffer, to see Sinclair (R. 365).

Shaffer did see Sinclair about March 23, 1922, and told Sinclair that he thought he was entitled to have the six hundred acres in Section 33. They came to no agreement about the matter (R. 366). In November, 1922, long after the lease had been executed to Mammoth Oil Company, Shaffer again saw Sinclair and Sinclair offered to allot to him four hundred and twenty acres under certain conditions which were not satisfactory to Shaffer. As a result no lands were ever allotted to Shaffer and nothing ever came of the matter (R. 371).

Prior to Shaffer's meeting with Secretary Fall on March 20, 1922, Gerald Hughes had told Fall that Shaffer

had said to him that he had an interest in the Pioneer titles and that some attempt had been made to turn them back to the Government without his consent and that he was very much opposed to it (R. 713-14).

The foregoing facts certainly do not sustain the averment of the bill that Secretary Fall made as a condition precedent to Sinclair's obtaining a lease, that the latter set apart certain lands in the reserve for Shaffer's benefit. Nor do they afford the slightest ground for inferences that Fall and Sinclair were on terms of intimacy.

(h) The Matter of Secrecy.

General Principles.

Secrecy is not fraud, nor standing alone is it an evidence of fraud. In addition to the secrecy itself, some injury must have resulted therefrom to one entitled to know. The truth is that secrecy is innocent and even praiseworthy far oftener than it is connected with fraud. The communications between husband and wife are secret, and so praiseworthy is this secrecy that no court will allow it to be invaded. The communications of a client to his legal adviser are likewise inviolable. The relations between bankers and their customers are treated as confidential matters. Trade secrets are of such character that courts will even enjoin one possessing them through confidential relations, from revealing them. The deliberations of the members of a court are secret and the results reached are kept secret until the time when the court publishes them at large. One engaged in commerce refrains from inform

ing his rivals of his future plans. The revelations to church officials in matters of conscience or relating to religious discipline are inviolable. The list might be very greatly extended.

It is difficult to see how the issue of secrecy can have any bearing upon this case unless such secrecy was availed of as a method for procuring the lease upon an inadequate consideration. Yet, in the case at bar, as both courts have held, the lease was advantageous to the Government—the consideration adequate. As the testimony shows, the lease was more favorable to the Government than other oil men were willing to make (*supra*, p. 34).

Who Caused the Secrecy?

The record shows that there was a policy of secrecy as to naval petroleum matters to the extent that publicity was not given to such matters but that policy was instituted long before there was any thought of leasing Naval Reserve No. 3 and it was instituted, not by Secretary Fall, but by the Navy Department (R. 623), no officer of which is charged with corruption or fraud.

The war plans of the Navy were secret (R. 425-579). The question of secrecy as to naval petroleum reserve matters arose first as to the Pearl Harbor project in October, 1921, and an agreement was then made between Admiral Robison and Secretary Fall, *at Robison's instance*, that information should not be given out until the matter was entirely completed (R. 619 and 623). In Acting Secretary Roosevelt's letter of December 9, 1921, transmitting plans for the Pearl Harbor project, he stated, "In view of the

fact that this project is embodied in the war plans of the Navy, it is requested that all matters in connection therewith be regarded in as confidential a manner as possible" (R. 700). That letter was the first intimation either Assistant Secretary Finney or Dr. Bain had as to secrecy (Finney, R. 303; Bain, R. 700). Neither did Ambrose receive any instructions from Secretary Fall as to secrecy. He treated the matter as confidential "because all naval matters were generally secret" (R. 341).

As Dr. Bain testified, the injunction of secrecy which originated in the Navy Department, "was carried over into our later discussions of any leasing of the naval reserves" (R. 700).

The Evidence as to Secrecy.

The averment of the bill as to secrecy is that:

> "Said *Albert B. Fall* did fraudulently and covinously cause all information concerning the making of the said agreement, both before it was made and for a considerable time after it was made, to be kept secret and concealed from his associates, from the Congress of the United States, and from the public" (Italics supplied), (R. 10).

As we have just seen, the secrecy emanated, not from Secretary Fall, but from officers of the Navy Department against whom no complaint is made.

As to Secretary Fall's "associates" the averment falls of its own weight. Besides Secretary Denby and Admiral Robison of the Navy Department, the following officers or employees of the Interior Department—none of whom is

charged with corruption or fraud—had a part in the making of the lease: Bain (R. 671; 674), Ambrose (R. 336-41), Eddy (R. 339), Lane (R. 340), and Hill (R. 340); and Assistant Secretary Finney knew from the first that a lease was being drafted (R. 284).

As to "the Congress of the United States", on April 12, 1922, the day on which Secretary Denby signed the lease, Secretary Fall wrote Senator LaFollette in reference to the features of the lease (R. 728-32).

As to "the public," Secretary Fall told Crawford that Naval Reserve No. 3 was to be developed but was not going to be offered publicly because bids were not desired from people who could not handle a project of such magnitude (R. 402). He told Darden (R. 401), Shaffer (R. 365), Helms (R. 383), Hughes (R. 712), and Beaty (R. 348) of his negotiations with Mr. Sinclair.

Mr. Beaty testified that *it was pretty well known to the oil companies that were in a position to handle a deal of that magnitude that a lease was under consideration. He saw no indications of secrecy* at his meeting with Secretary Fall and there was no intimation made to him that the talk he had with Secretary Fall was confidential or that he was not to divulge anything in relation to the subject (R. 355). Hughes testified that there was no suggestion or intimation to him by Secretary Fall of secrecy (R. 714).

Secretary Fall, prior to April 6, 1922 (when the Teapot Dome lease was in final form for execution), declined in two instances only to give information to those that sought it: First, to Kistler, who submitted a proposition that could not be accepted (*supra*, p. 140), and second to one Joseph

W. Clark who made a vague inquiry as to the possibility of leases on the Naval Petroleum Reserves and whom the Government did not in any way show to be a "responsible" bidder (R. 409-12).

Additional evidence upon the question of secrecy, chronologically stated, is as follows:

On April 6, 1922, the Interior Department gave out a memorandum for the press in reference to a Denver, Colorado, dispatch published in a New York newspaper, relating to a rumor that Teapot Dome had been leased. The memorandum stated that a policy had been determined upon but no definite contracts had yet been made (R. 389-90).

On April 7, 1922, Senator Kendrick of Wyoming received a telegram from one of his constituents, Leslie Miller, who desired a lease on a small tract of Teapot Dome. Senator Kendrick sent his Secretary, W. A. Anderson, to the Interior Department for information in reference to the matter (R. 387-8). Anderson saw Finney who referred him to Secretary Fall. Secretary Fall was not available but his secretary, Mr. Safford, stated to Anderson that no lease had been signed. Anderson asked that Senator Kendrick be kept informed (R. 393). On April 10 Dr. Bain at Secretary Fall's request, sent Senator Kendrick a copy of the memorandum given out under date of April 6 (R. 389).

The contract was signed by Secretary Denby on April 12. On that date Fall sent Denby a copy of a memorandum which he had made for the government of his staff in the Interior Department not to give out any information as to the *details* of any plans (R. 287, 290).

Under date of April 12, 1922, Secretary Fall sent to Senator La Follette a memorandum of the principal features of the Teapot Dome lease pursuant to a request made by Senator La Follette upon the State Department for copies of various orders dealing with naval petroleum reserves (R. 728-32).

Secretary Fall was leaving Washington for the west on the evening of April 13. Before leaving he told Finney and Bain that the lease had been executed but that he did not want to let the contract get out until after the Pearl Harbor contract was also made (Finney R. 286-7; Bain R. 690).

Before leaving on April 13, Secretary Fall wrote to President Harding in reference to the information he had given Senator La Follette (R. 734).

On April 14, 1922, one Peter Q. Nyce wired Finney asking if Teapot Dome had been opened for development and if so, with whom. Finney replied that it had been but that he was not in a position to give out details in the absence of Secretary Fall (R. 418).

On April 13, Senator Kendrick introduced in the Senate a bill providing that royalties from Naval Reserve No. 3 should accrue to the State of Wyoming (R. 391).

On April 15, 1922, Senator Kendrick introduced a resolution calling upon the Secretary of the Navy and the Secretary of the Interior for information as to whether a lease was being negotiated of Naval Reserve No. 3 (R. 391-2). This resolution was adopted as Senate Resolution No. 277.

Under date of March 24, 1922, Admiral Robison wrote Congressman P. H. Kelly pursuant to the latter's request for information relative to the operation of the naval reserves. In this letter he told of the general policy that had been pursued in respect of the reserves but did not give information concerning what was being done as to Naval Reserve No. 3 (R. 415-17).

On April 6, 1922, the Inland Oil Index, a newspaper of Casper, Wyoming, wired the Secretary of the Navy to confirm or deny the report that Teapot Dome lease had been made with Sinclair. The Navy Department replied on April 7 that it had made no contract (R. 417-18). Admiral Robison testified that he sent the reply wire to the Inland Oil Index, that his wire contained the truth in that Secretary Denby had not then signed the lease and that he did not tell the newspaper more because he did not think it or any other newspaper necessarily had any right to knowledge as to what was being done in the department (R. 620).

Under date of April 17, 1922, Congressman Sinnott wrote Admiral Robison asking, among other things about the naval reserves, how much of Teapot Dome had been leased to Sinclair (R. 419). Robison replied that the information could be obtained at the Interior Department.

Sinnott's letter, however, led Admiral Robison to take up with the Interior Department the matter of making a public announcement of the lease. He discussed the matter with Secretary Denby and Judge Finney (Secretary Fall then being absent) and it was decided to make such a public announcement (R. 621).

On April 18, 1922, a memorandum for the press was given out by the Interior Department announcing the lease

with the Mammoth Oil Company (R. 375-77). The Navy Department also prepared immediately to make mimeographed copies of the lease to be distributed to whomsoever requested them (R. 621).

Congressman Frank W. Mondell received a telegram on April 16, 1922, from the Rocky Mountain Oil & Gas Producers Association protesting against a lease of Naval Reserve No. 3 as detrimental to the interests of the oil producers of Wyoming. He went to see Admiral Robison and read the Navy's copy of the contract (R. 622) and shortly thereafter received copies of it (R. 295). Mondell discussed the contract with Admiral Robison and was impressed with his familiarity with it (R. 295).

At the time the lease was being negotiated the Limitation of Armaments Conference was sitting in Washington (R. 431). Admiral Robison felt there was no necessity of going to Congress for authority which he was advised and thought had already been conferred upon the Secretary of the Navy by Congress and he considered that taking the matter up with Congress for express approval would have resulted in "long discussion and much publicity which, at the time, I think would have been unfortunate in an international sense" (R. 652).

The Evidence of Secrecy Falls Short.

Whether the motives of the Navy Department for such secrecy as was practiced were sufficient to justify it or not, there is nothing in the evidence that affects Mr. Sinclair or the Mammoth Oil Company, or the contracts sought to be cancelled. There was no testimony in the secrecy as detailed

to cause the Government to obtain less favorable contracts than would have been obtained without the secrecy and in fact as we have seen, the contracts were unusually favorable to the Government.

Why should Mr. Sinclair or the Mammoth Oil Company be held guilty of fraud because of secrecy with which they had no connection? There is no hint in the record that Mr. Sinclair or the Mammoth Oil Company knew of the secrecy or in any way participated in any effort or even in any desire to keep knowledge of the facts either from Congress or from the general public. Not only is there an absence of evidence that Mr. Sinclair or the Mammoth Oil Company had notice of concealment but there is also absence of any charge of such notice in the bill, as will be seen from the language of the bill hereinbefore quoted (*supra*, p. 146).

We submit that no officer of the Government is shown to have been remiss in any matter evidenced by the secrecy claimed, but it would not be enough that such officer were shown remiss in order to cancel the contracts here. It would be necessary to show in addition that the Mammoth Oil Company or Mr. Sinclair who represented it participated in it or at least knew of the dereliction. This is the rule in actions to set aside conveyances with intent to defraud creditors. *Prewitt* v. *Wilson*, 103 U. S. 22, 24; *Jones* v. *Simpson*, 116 U. S. 609, 615; *Cohan* v. *Levy*, 221 Mass. 336; *In re Locust Building Co., Inc.* (C. C. A. 2), 299 Fed. 756.

It is likewise true in cases where an agent with apparent authority disposes of his principal's property, the agent being guilty of fraud in the matter against his principal but without notice to or participation therein by the purchaser.

Andrews et al. v. *Solomon et al.* 1st Fed. Cases 889 (Case No. 378, Opinion by Mr. Justice Washington); *Paxton* v. *Marshall*, 18 Fed. 361, *Brooks* v. *Dick, et al.*, 135 N. Y. 652; *Mason Executor, et al.* v. *Bauman*, 62 Ill. 76; *Pacific Express Co.* v. *Carroll Co. Bank*, 66 Mo. Appeals 275; *Chetwood* v. *Berriman*, 29 N. J. Equity 203; *Myers* v. *Mutual Life Ins. Co.*, 99 N. Y. 1. These authorities make it clear that secrecy and concealment by an agent manifested in his conduct toward his principal, even if a fraud on the principal, will not charge a third person dealing with the agent unless notice thereof be brought home to such third person.

(j) The Exchange by Sinclair of a Portion of the Mammoth Oil Company Stock for Sinclair Consolidated Oil Corporation Stock.

The Court of Appeals apparently treats as significant without directly stating how, the exchange by Sinclair with Sinclair Consolidated Oil Corporation of one-fourth of the stock of the Mammoth Oil Company for stock of that corporation, designated by that court as "property of the value of more than $8,000,000". In the same connection the Court of Appeals speaks of the assets of the Mammoth Oil Company in these words: "this lease being the only asset of said Company" (R. 828).

In its observations and findings as to the exchange of Mammoth stock for Consolidated stock by Sinclair the Court of Appeals ignores all questions of the time when these things were done and of what had happened meanwhile. The lease, it will be remembered, is dated April 7th and was executed finally on April 12th, 1922.

Mr. Sinclair's proposition to make this exchange was made in September between five and six months subsequent to the granting of the lease (R. 552-553). Included in Mr. Sinclair's proposition is his statement that he will place $3,000,000 cash in the treasury of the Mammoth Oil Company (R. 553).

The Sinclair Consolidated Oil Corporation, because of the relation between it and Mr. Sinclair, was unusually careful to consider the proposition and caused investigations to be made in order to ascertain the value *at the time of this exchange* of the property of Mammoth Oil Company. All of this is shown by a report of a Committee of Sinclair Consolidated Oil Corporation (R. 553-559). The report of this Committee is not dated, but at the end of the report it shows a date—September 28, 1922—and the Committee also presented a legal opinion concerning the transaction by Cravath, Henderson, Leffingwell & DeGiersdorff dated September 29, 1922 (R. 559-565).

In the report of the Committee are several significant facts. It is shown that Mr. W. A. Kunkel "a well known expert", was employed to investigate the properties; that Mr. Kunkel and Dr. Veatch, the corporation's geologist, visited the properties in making the investigation, and that Mr. Kunkel appeared before the Committee and was examined at some length, and that he was very certain of the conclusions that he reached (R. 554). The report by Mr. Kunkel as made to the Committee is not in evidence. Some matters contained in it, however, are in the report of the Committee. Among other things his report showed that he had been familiar with Teapot Dome for several years and

that his "previous convictions" as to the presence of oil in Teapot Dome "have, during the past six months *been confirmed* by the bringing in of wells drilled just off the narrow edge of the Dome toward the Salt Creek Field. He regards the existence of oil as established to the satisfaction of an oil expert and his certainty of the existence of oil is such that he would act on it as demonstrated if the decision rested entirely with him" (R. 555, lines 15-21).

In other words at the time of this exchange of Mammoth stock for Sinclair stock by Mr. Sinclair the *hope* that existed at the time of the making of the lease that oil might be found in paying quantities in Teapot Dome had been made practically certain by wells in the land immediately adjacent. It is true that oil operators will lease lands upon the hope that oil may be found, and will expend large amounts of money in drilling to ascertain whether their hope shall be realized. But it is distinctly not true that the value of a lease upon such lands is the same at the time when the lease is granted under the *hope* as it is when the presence of oil has been demonstrated. Upon this question this Court in the case of *Twin-Lick Oil Company* v. *Marbury*, 91 U. S. 587, at page 592, uses the following language:

> "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for $1000 as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day."

In the case of *Patterson* v. *Hewitt*, 195 U. S. 309, at page 321, this Court says:

> "There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth its millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized."

In this case the Court of Appeals gave no weight whatever to the discoveries just off the edge of the land in controversy which made certain the existence of oil in the Teapot Dome. Nor did it take any notice of the expenditures that had been made by Mr. Sinclair, or of the cash that he was placing in the treasury.

The evidence, then, of this exchange by Mr. Sinclair has no tendency to conflict with the direct and positive evidence of Mr. George K. Thomas, Mr. John McFayden, Mr. Gerald Hughes, Dr. Bain, Admiral Robison, and the offer by the Texas Company, which it must be presumed was thought fair by that company. All of these show that the lease *at the time it was made was at least* fair to the Government.

(k) The $25,000 Loan by Sinclair to Fall in June, 1923.

The facts of this transaction in respect of which no charge was made in the bill of complaint, although known to the Government, because stated to the Senate Committee on Public Lands and Surveys (R. 568) are as follows:

Fall ceased to be Secretary of the Interior on March 4th, 1923 (R. 4).

In May, 1923, Mr. J. W. Zevely, went to see Secretary Fall in Three Rivers, New Mexico and asked him to go to Russia with Mr. Sinclair as counsel in regard to certain controversies in connection with applications for oil leases in that country (R. 568). Mr. Fall stated that he could probably go but not as soon as Mr. Sinclair wanted him to go, that he would follow later but that he would need some money, that he had some things to do down at home before he could go, one or two small ranches he wanted to buy there and would need $25,000. He also told Mr. Zevely that before he could go he would have to go to Washington to see if the Administration approved his going on such a mission since he had been connected with the Administration. Secretary Fall subsequently went to Washington (R. 549) and before Mr. Sinclair sailed for Europe—May 26th, 1923—(R. 551) Mr. Zevely told Mr. Sinclair that Secretary Fall might want $25,000; that at that time Mr. Sinclair told his private secretary, G. D. Wahlberg in Mr. Zevely's presence, that Mr. Zevely might want $25,000 and if he did, to give him Liberty Bonds for that amount. Within a week or ten days thereafter Mr. Zevely requested the bonds (R. 551). On June 5, 1923, Mr. Zevely wrote James C. McNary, President of the First National Bank of El Paso, Texas, that he was sending by express a package which was the property of Secretary Fall and was to be received for his account (R. 549-50). Secretary Fall wrote Mr. McNary stating that he was having forwarded from New York $25,000 in United States Bonds and giving

directions as to them (R. 549). On June 12, 1923, Mr. McNary wrote Mr. Zevely acknowledging receipt of the letter of June 5th and stating that the package had been received (R. 550). On June 11, 1923, the bonds were credited to the account of Secretary Fall in the First National Bank (R. 549).

We submit this transaction, occurring as it did several months after Fall had gone out of office and over a year after both the execution of the lease and the inferred bribery in connection therewith, can not be treated as a matter upon which to base the inference of bribery.

Upon no theory of law can the transaction have the slightest relevancy to the charge of bribery made in the Government's brief below or to any issue raised by the bill. However, the Court of Appeals says:

> "The transaction tends to show that the dealing in bonds between Sinclair and Secretary Fall was not a novel affair, unusual as it might be in the business world, and reveals an intimate relationship between Secretary Fall and Sinclair. * * * It relates back and tends to taint the contract, perhaps not in itself sufficiently to invalidate it, but is to be considered as a weighty circumstance bearing on the good faith of the matter" (R. 840).

The record facts stated above clearly support the finding of the District Court that the transaction was done openly without any attempt to conceal it and was fully and legitimately explained (R. 262-3).

The Court of Appeals states:

> "Secretary Fall suggested to Zevely, who appears to have been managing the matter, that he de-

> sired the approval of the administration as to this enterprise. It is not disclosed that the same was ever sought. Assuredly it was not forthcoming" (R. 839).

With evidence in the record that Fall said he would seek the Administration's approval, that he was in Washington subsequent to his conversation with Mr. Zevely and before he went abroad, and that he did go abroad, is it not a more reasonable inference that he did seek the administration's approval and that such approval was given?

We quote further as to what the Court of Appeals says of the $25,000 of Bonds:

> "There is no identification of these bonds as being bonds ever owned by the Continental Trading Company, Ltd., although they are three and one-half per cent Liberty Bonds, and in that respect bear similarity to the bonds received by Everhart about a year before these were taken from Sinclair's box" (R. 839).

This seems indeed a trivial circumstance from which to draw an inference that Mr. Sinclair bribed Secretary Fall.

In *United States* v. *Hancock*, 133 U. S. 193, 196, this Court referring to a gift of a part of the property involved made to a former Government officer after he had ceased to hold office, by a party with whom he had dealt officially while in office concerning the same property—a transaction surely more open to suspicion than a loan, such as was the $25,000 transaction in the case at bar—said:

"It is true there is testimony furnished by Mr. Hopkins himself that some time after the patent had been issued he accepted a deed of a portion of this grant as a present from the owners—a tract which he subsequently sold for $1,500. Whatever criticism may be placed upon the acceptance of this gift—a gift made long after his relations to the survey had ceased—it certainly does not establish dereliction in his discharge of prior official duty."

Conclusions as to the Charge of Bribery.

We have now reviewed all of the matters designated by the Court of Appeals as "condemnatory incidents" and the inferences therefrom which that court says "supply the so-called missing links in the testimony and satisfy us of Sinclair's connection with the Continental Trading Company, Ltd., and with the acquisition of the government Liberty Bonds by Everhart and Secretary Fall" (*supra*, p. 104).

We submit, not merely that there are "missing links", but, indeed, that there are no links to make up a chain of proof that Mr. Sinclair was connected with the Continental Trading Company or with the Liberty Bonds claimed to have been in the possession of Everhart; that no incident in relation either to Mr. Sinclair's business transaction with the Continental Trading Company, Ltd., or to any act or thing done by him in the matter of negotiating the lease and contracts in issue, may fairly be characterized as "condemnatory".

Was there anything inconsistent with honesty and integrity: in Mr. Sinclair's acting for Sinclair Crude Oil Purchasing Company in the joint purchase by that com-

pany and Prairie Oil & Gas Company of oil from the Continental Trading Company, Ltd.; with his inquiry of Secretary Fall on December 31, 1921, as to whether Teapot Dome would be leased; with his willingness to clear Naval Petroleum Reserve No. 3 of outstanding claims in order that the Secretary of the Navy might make a lease free from controversy and insure to the Navy a share in all the oil taken from the reserve; with his willingness and offer to allot a portion of the lands to Shaffer; with his offer to meet the requirements of the Navy in connection with a lease; and finally with his obtaining a lease shown to be wholly advantageous to the United States and held by both the District Court and the Court of Appeals to be authorized by law and to have been made by Secretary Denby in compliance with law?

If there be aught to criticize in the promulgation of the Executive Order, or in connection with the Navy's policy of secrecy, or in the Navy's determination of the question of drainage and decision to lease the reserve, or in Secretary Fall's acting for the Secretary of the Navy, together with Admiral Robison, in the negotiation of the lease, or in Secretary Fall's action in the matter of the quieting of claims on the reserve, or in any other act of any government official in connection with the making of the lease—and we submit there is not—the fact would still remain that neither Mr. Sinclair nor the Mammoth Oil Company was responsible for any of such matters. How, therefore, can they be "condemnatory" of Mr. Sinclair or of the Mammoth Oil Company?

We repeat that the Court of Appeals drew unreasonable and illegitimate inferences from these various mat-

ters (thereby committing error of law) and used such inferences as further bases from which to draw the inferences, first, that Mr. Sinclair received Liberty Bonds from the Continental Trading Company, Ltd., and second, that he delivered Liberty Bonds to Everhart or Secretary Fall, thereby again committing error of law.

An inference may no more be legitimately drawn from a myriad of other inferences than from a single other inference.

Upon the issue of fraud, we therefore respectfully submit that the decision of the Court of Appeals should be reversed.

The Legality of the Lease and Contracts.

This Court in the case of *Pan American Petroleum & Transport Company et al.* v. *United States*, No. 305 October Term, 1926, decided February 28, 1927, considered certain features of the Act of June 4, 1920. Of course the facts in that case must be looked into in any attempt to give a just interpretation of the decision.

This Court finds in that case, as was also in effect found by both lower courts, that the companies contracting there with the United States

> "sought and corruptly obtained Fall's dominating influence in furtherance of the ventures. It is clear that at the instance of Doheny, Fall so favored the making of the contracts and leases that it was impossible for him loyally or faithfully to serve the interests of the United States."

The Court in its opinion states the initial contract there involved as follows:

> "The Transport Company agreed to furnish at the Naval Station at Pearl Harbor, Hawaii, 1,500,000 barrels of fuel oil and deliver it into storage facilities there to be constructed by the company according to specifications of the Navy. The Company was to receive its compensation in crude oil to be taken from the Reserves. The quantity, on the basis of the posted field prices of crude oil prevailing during the life of the contract, was to be the equivalent of the market value of the fuel oil and also sufficient to cover the cost of the storage facilities. The United States agreed to deliver to the company at the place of production month by month all the royalty oil furnished by lessees in Reserves Nos. 1 and 2 until all claims under the contract were satisfied. It was stipulated that if production of crude oil should decrease so as unduly to prolong performance, 'then the Government will, in the discretion of the Secretary of the Interior, grant additional leases on such lands as he may designate in naval petroleum reserve No. 1 as shall be sufficient to maintain total deliveries of royalty oil under this contract at the approximate rate of five hundred thousand barrels (500,000) per annum'. And, by Article XI of the contract, it was agreed that, if during the life of the contract such additional leases should be granted within specified areas, 'the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance * * * the contractor shall be granted by the Government a preferential lease on

> such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree * * * then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding.' "

Three other contracts were involved in the *Pan American case*: first, a lease dated June 5, 1922, made pursuant to provisions contained in the initial contract of April 25, 1922 and made in aid of said initial contract; second, a contract dated December 11, 1922, providing for the construction and filling of additional storage facilities at Pearl Harbor and elsewhere and for the leasing to the Pan American Company of all unleased lands in Reserve No. 1 in aid of said contract and of the initial contract dated April 25, 1922; third, a lease dated December 11, 1922, made pursuant to the contract of that date and made in aid of said contract and of the initial contract of April 25, 1922.

Other matters tending against the contracts there involved are mentioned in the opinion of the Court but need not concern us further here. Suffice it to say that this Court as to any purpose of those contracts to protect the United States against loss of petroleum by drainage says:

> "It is certain that the contracts and leases have no such purpose"

and at another place the Court says:

> "The danger of drainage had been eliminated by agreement between the United States and oil companies operating in the vicinity, etc."

In that case on the facts this Court was not called upon to give any opinion as to a lease of Naval Petroleum Reserves made to prevent loss of petroleum to the United States through drainage and did not attempt to give any direct opinion upon any such case. Indirectly it had something to say in the matter and used this language:—

> "The possibility of loss by drainage might be a reason for legislation enabling the Secretary to take any appropriate action that at any time might become necessary to save the petroleum."

This of course is indirect and could not have been otherwise because no purpose of such protection was involved in that case.

Did the Act of June 4, 1920, Authorize the Lease and Contracts Here?

Clarity of discussion requires that the above question be discussed separately as to each contract here involved:

1. The lease proper, contained in an instrument dated April 7, 1922, viz: the agreement by which the Government leases to the Mammoth Oil Company the described lands upon the consideration that the Mammoth shall drill the lands as specified and pay the Government as royalties stipulated shares of the oil produced from the lands.

2. An agreement contained within the same instrument containing the lease, by which the lessee disposes of the royalty oils to the lessee at prices automatically fixed at the time such oil is produced by certain posted market prices. The lessee has four

options as to the equivalents to be received by it for the royalty oils: (1) It may take cash; (2) It may exchange for fuel oil; (3) It may exchange for other oil products suitable for naval use; (4) It may exchange such quantities of the royalty oils for storage facilities as are necessary to conserve such fuel oil as it might elect to receive in exchange, pursuant to the second option hereinabove enumerated.

(NOTE: The exchange of royalty oils for fuel oils was to be on a quantitative basis without reference to prices.)

3. A supplemental agreement dated February 9, 1923, made pursuant to the exercise by the lessor, the Government, of the options reserved to it to exchange the royalty oils for fuel oil and other oil products suitable for naval use, together with storage facilities required to conserve such fuel oil and other products.

Some matters have been suggested in this brief arising from the record that must be borne in mind in considering the question of legality as to each of these agreements. The record shows that all oil lands in what is called the "Salt Creek Field" which is separated from Naval Reserve No. 3 only by an imaginary line, had been leased prior to and on June 15, 1921, the amount leased on June 15, 1921 covering sixty-four hundred acres and completing the leasing of said Salt Creek Field (*supra*, p. 21); that the leases above mentioned required diligent drilling by the lessees thereunder (R. 299; 311); that in early September, 1921 Dr. H. Foster Bain, Director of the Bureau of Mines, and Mr. Arthur W. Ambrose, Chief Petroleum Technologist of that bureau, had been advised at Denver by Mr. Carroll

H. Wegemann (the father of Teapot Dome so far as laying it out and fixing its boundaries were concerned) and by Fisher & Lowrie, Petroleum Engineers, who had then recently examined the field, of certain geological facts which they had discovered and which, coupled with the leases of June 15, 1921, would lead to drainage of Naval Reserve No. 3 (*supra*, pp. 21-4); that in late September and early October, 1921, Wegemann was in Washington and submitted to the Navy and Interior Departments a written report in which he not only outlined the drainage that would be caused in Reserve No. 3 by the leases of the Salt Creek Field, but also pointed out the danger of losing oil to the Government by reason of movements of oil and water in the beds of the reserve itself that would be caused by the operations in the Salt Creek Field, and further pointed out that "there is no doubt that from the point of development of the property and recovery of oil from it, it will be much better to develop the property as a unit before the invasion of the water. The Navy Department cannot prevent draining the property as outlined above. It can make arrangements for the proper development of the property under conditions which will be mutually advantageous to the Navy Department and the operators" (R. 323); that as demonstrated in various typical oil fields it is impossible to prevent drainage when others have drilled or are about to drill into an oil pool (*supra*, p. 26); that very large amounts of oil had been lost from Naval Petroleum Reserve No. 2 in California from inability of the Government to make leases thereon prior to the passage of the Act of February 25, 1920, and from both California reserves through the de-

lay in drilling wells therein after February 25, 1920, but prior to March 1, 1921 (*supra*, p. 26); that in the opinion of the Bureau of Mines if wells on lands adjoining Reserve No. 3 in what is called the Salt Creek Field should reach the pool first, they would inevitably take from the Government—cause the Government to lose—large and indefinite quantities of its oil (*supra*, p. 27); that such wells reaching the pool prior to the time when wells on the reserve itself might reach the pool, would, not only initially, but probably continuously for an indefinite time, draw more than their share of oil—draw part of the Government's share of the oil even after the wells on the reserve might reach the pool; that it takes time to assemble material and drill wells to the point of reaching the oil.

> (NOTE: In the case at bar although the lease was agreed upon by April 7th and the last signature attached April 12th, 1922, and although the lease requires diligent drilling, no well under the lease had reached the oil in the reserve on September 28th, 1922 (R. 555). Admiral Robison states in his testimony that it would require about nine months from the time of beginning operations on the reserve to furnish oil at the seaboard.)

The inexorable laws of physics of which this Court has judicial notice, would of themselves make it certain that oil cannot be preserved in a pool such as Naval Reserve No. 3 when wells have reached that pool on other lands adjacent to the reserve. Oil is usually under great pressure, hydrostatic from below and gaseous from above, and such was the fact in respect of Naval Reserve No. 3 as Wegemann's report shows. In such a situation oil is a fugitive thing, seeking every avenue of escape and promptly moving in the direction of any well opened into the pool containing it.

These are the facts briefly reviewed but hereinbefore more fully stated which were before the Secretary of the Navy and under which he was called upon to exercise his discretion.

Of course, Congress knew that a situation similar to that above described and which is proven by the evidence to have existed here, might, indeed probably would, arise.

In *Chesapeake & Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 245, this Court said:

> "It is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation."

So, at the same session of Congress and but a few months after passing the Act of February 25, 1920, Congress passed the Act of June 4th, providing that

> "the Secretary of the Navy is directed to take possession of * * * the Naval Petroleum Reserves * * * to conserve, develop, use and operate the same in his discretion, directly or by contract, lease or otherwise and to use, store, exchange or sell the oil and gas products thereof * * * for the benefit of the United States" (R. 4-5).

(1) *The Lease Contained in the Instrument of April 7, 1922.*

The District Court, in stating the purpose, policy and authority granted by the Act of June 4th, uses this language:

> "Lying adjacent to the great Salt Creek Field where the leases were being granted by the hundred, or about to be, Congress realized, judging by the text of the Act of June 4th, that there was danger on account of this intense leasing, of drainage and a loss in the naval reserves themselves, and in consequence passed the act as a remedial measure for the purpose of taking the oil out if found necessary to save it" (R. 269).

With this in mind and applying to the statute the evidence as to the insecurity of the oil in the Reserve, the District Court held that the lease in controversy was authorized by the statute. This is a finding on a question of fact. In like manner the Court of Appeals construed the statute as follows:

> "Certainly, if the oil can be properly conserved in the ground the Secretary of the Navy is not under compulsion to develop the properties. What he does must be for the benefit of the United States. That is the limitation of his discretion. If he shall determine that the oil cannot be properly conserved within the ground, then he has the right to develop, use and operate the properties directly or by contract, lease or otherwise" (R. 812).

The Court of Appeals in applying the evidence to the statute so construed makes this finding:

> "We content ourselves with saying that on this branch of the case, as at present advised, we are in accord with the conclusion reached by the trial Court, that the authority granted by the Act of June 4, 1920, is sufficient to authorize the lease and contract in question" (R. 816).

The result is that with the statute construed as this Court apparently, though indirectly, construes it, both Courts below found that the facts brought the lease within the statute as so construed.

Any careful survey of the evidence, we submit, will show that this concurrent finding is in accordance with the evidence in the case, and certainly will disclose that the finding is not "clearly" against the weight of the evidence. *Charleston, South Carolina, Mining & Manufacturing Co.* v *United States*, No. 93, October Term, 1926, decided by this Court February 21, 1927.

(2) *The Collateral Agreement Disposing of the Royalty Oils, Contained in the Instrument of April 7, 1922.*

The Act of June 4th grants authority to the Secretary of the Navy to "use, store, exchange or sell" the oil and gas products from the Naval Reserves.

As we have hereinbefore shown, in the same instrument containing the lease of Naval Reserve No. 3, there is a further agreement by which the lessor disposes of the royalty oils accruing to it under said lease to the lessee. Under such agreement the lessee issues to the lessor certificates showing the amount and value (determined by reference to specified market prices at the time the oil is produced) of said royalty oils. Said certificates are redeemable by the lessee and may be used by the lessor (the lessor having the entire decision in the matter) in the following ways:

> First: The lessor may take cash for each certificate in the amount stated therein as the value of the oil represented by such certificate.

> **Second:** The lessor may receive fuel oil for the royalty oil represented by such certificate, the exchange being on a quantitative basis at specified ratios.
>
> **Third:** The lessor may receive other oil products (*i. e.*, in addition to fuel oil) suitable for use by the Navy.
>
> **Fourth:** The lessor may in connection with its right to use certificates in exchange for fuel oil, use additional certificates, but only such amount as is necessary for the purpose, to exchange for storage tanks required to conserve the fuel oil it elects to receive.

The first three of the four above mentioned options are in the alternative. The fourth is a supplement to, and is limited by, the option to receive fuel oil.

We take it that there can be no question as to the legality of the first option mentioned, namely, to have the certificates redeemed in cash which would by operation of law go into the treasury of the United States and which therefore, would be subject to appropriation by Congress for the use of the Navy or otherwise.

Likewise, we take it from the opinion of this Court in the *Pan American* case, that the option to exchange the royalty oils for fuel oil and other oil products suitable for use by the Navy must be held entirely legal. In that connection it should be remembered that the Naval Petroleum Reserves were created for and dedicated to the "exclusive use or benefit of the United States Navy" (*supra*, p. 15). The lease here was made to prevent loss to the Navy of the oil in Naval Reserve No. 3—to conserve the oil for the

Navy. But the oil in its crude state as produced from the lands was not usable as fuel oil for the Navy's ships (R. 593-4), so that conservation of such oil for reserve purposes resolved itself into conservation of equivalents of such oil in oil products suitable for Naval use as fuel and lubricants.

The matter was stated by this Court in the *Pan American* case as follows:

> "The circumstances of the enactment as well as the terms of the provisions indicate a purpose to authorize exchange of crude petroleum from these reserves for fuel oil and other petroleum products suitable for use by the Navy. The Secretary was not authorized to refine the crude products. A draft of the Act included that authority, but the word 'refine' was stricken out. This made necessary the exchange of the crude product for fuel oil and other products suitable for use."

This brings us to the question of the legality of the option to use some of the royalty oils in exchange for such storage tanks as might be required to conserve whatever fuel oil the Secretary of the Navy elected to receive in exchange for royalty oils.

In the *Pan American* case this Court said:

> "As the Secretary, among other things, was authorized until July 1, 1922, to use money out of the appropriation to 'store' oil and gas products from these lands, it will not be held, in the absence of language clearly requiring it, that he was also empowered *without limit* to use crude oil to pay for additional storage facilities." (Italics supplied.)

In the case at bar the Secretary of the Navy clearly did not attempt to use crude oil to pay for storage facilities "without limit". Here the option to exchange for storage was expressly limited by the contract itself to such as was required for the conservation of the fuel oil elected to be received. As we have hereinbefore shown, the language of the contract is:

> "The lessee agrees, if and when requested so to do by the lessor, to construct or to pay the cost of construction of steel storage tankage up to but not in excess of such an amount as shall be estimated to be necessary or required for the storage by the lessor of the fuel oil to be received by it as hereinbefore provided in exchange for royalty crude oil from the lands hereby leased; said storage to be constructed as and when the same shall become necessary or shall be required for the storage of such fuel oil so delivered by the lessee or its nominee, and said storage to be located at points designated by the lessor; the cost of such tankage to be liquidated by lessor by delivering to the lessee or its nominee crude oil certificates hereinbefore referred to, said certificates so delivered to be of the face amount in value equal to the cost of such tankage for which the lessee or its nominee shall have paid or become liable" (R. 26).

This seems to us entirely in harmony with the policy concerning the Naval Petroleum Reserves—to conserve the oil in the specified lands or rather its equivalent in oil products usable by the Navy as a *reserve* for the exclusive use or benefit of the Navy.

The Act of June 4th, 1920, seems to us remedial in character. It provides means to protect against loss of oil from the Naval Petroleum Reserves and to transform the oil threatened with loss into oil products stored in such a way as to be secure from any loss. The spirit of a statute is to be observed as well as the letter, and what is implied is as much a part of the statute as what is expressed.

Fleischmann Construction Co. v. *United States* to the use of Forsberg, 270 U. S. 349-360;
Stafford v. *Wallace*, 258 U. S. 495;
Ross v. *McIntyre*, 140 U. S. 453;
Telegraph Co. v. *Eyser*, 19 Wall (86 U. S.) 419.

Moreover the Act has in it the word "store" in relation to the oil produced from the lands. But, as we believe this Court has indicated, the conservation of the oil produced from the lands in practical effect means conservation of oil products received as equivalents of the crude oil. Crude oil being highly volatile may not be stored above ground without serious loss through evaporation but fuel oil may be stored for an indefinite period without appreciable loss (R. 378). How, in the exercise of wise discretion, can the Secretary of the Navy better conserve the oil in Naval Petroleum Reserve No. 3 which was threatened with loss, than by reserving to himself as he did in the contract of April 7th, the right to exchange the royalty crude oils which were not usable and which could not be stored, for fuel oil and other oil products which the Navy actually uses, stored in secure containers as a reserve.

We deem it not amiss in connection with our discussion of the option concerning storage to refer briefly to the $500,000 money appropriation contained in the Act of June 4th. That money appropriation was not by the statute made applicable solely to the construction of storage. The language of the Act is "for this purpose" meaning, we think, for the purposes of the Act generally. Included within the authority granted to the Secretary of the Navy were some matters which clearly would have required the expenditure of money by the Secretary had he elected to exercise such authority. But likewise clearly there were matters for which he did not require a money appropriation. He needed no money to lease and, having leased, he needed no money to exchange royalty oils for fuel oil and other oil products. Moreover the authority to lease and the authority to exchange were not limited as to time whereas the money appropriation (which was indeed a contingent appropriation in that it was of "such sums as have been or may be turned into the treasury of the United States from royalties on lands within the Naval Petroleum Reserves") expired by the terms of the Act on July 1, 1922. If the money appropriation did not limit the authority of the Secretary of the Navy to conserve the oil in Naval Petroleum Reserve No. 3 by leasing said reserve and did not limit his authority to exchange royalty oils accruing under the lease for fuel oil and other oil products, should it be construed to limit the authority to exchange for containers necessary to conserve the fuel oil and other products? May not the money appropriation be given proper effect without construing it as a limitation upon powers granted

to the Secretary in relation to which no money expenditure was required?

(3) *The Supplemental Agreement of February 9, 1923.*

As indicated by the date thereof the supplemental agreement was executed approximately ten months after the execution of the lease and collateral agreement contained in the instrument dated April 7th, 1922.

It was made pursuant to the exercise by the Government of the options contained in the collateral agreement in the instrument of April 7th to exchange royalty oils accruing to it from the leased lands for fuel oil and other oil products and the option supplemental thereto to exchange some of the royalty oils for storage facilities necessary to conserve such fuel oil and other oil products. At the time of its execution royalty oils were, and for some time had been, accruing to the Government and the agreement provided that the Mammoth Oil Company should forthwith construct at the Navy Yard at Portsmouth, New Hampshire, storage facilities for 42,000 tons of fuel oil and for specified quantities of other oil products and fill the tanks with the products for which they were designed. The agreement likewise provided for additional projects of tanks filled with fuel oil and other products to be undertaken one after another as, if and when royalty oils accrued to the Government sufficient to furnish by exchange the fuel oil and other oil products desired in respect of each project.

In no respect does the supplemental agreement of February 9th, 1923, overreach or depart from the purpose expressed in the contract of April 7th, 1922, to construct only

such storage facilities as are required to conserve the oil products which the Government in said supplemental agreement elected to receive in exchange for the royalty oils accruing from the lease.

It may be well to recall the situation as it existed when the supplemental agreement was entered into. The money appropriation contained in the Act of June 4th, 1920, had by efflux of time ceased to exist on July 1st, 1922, months before the execution of the supplemental agreement, but as we have hereinbefore pointed out the authority to lease and to exchange—in other words, the general authority given in the Act of June 4th—had not expired and indeed was without any limitation as to time. At the time of the execution of the supplemental agreement the Secretary of the Navy was and for some time had been actually receiving royalty oils and had a reasonable expectation of continuing to receive royalty oils for an indefinite time. What must he do with such royalty oils? As we have pointed out hereinbefore it was entirely within the purpose and policy of the orders creating the Naval Petroleum Reserves that the Secretary of the Navy reserved to himself in the contract of April 7th, 1922, the right to exchange the crude oils which he could not use and which he could not store for fuel oil and other oil products which he could use and which he could store; and the supplemental agreement was merely in the exercise of the right so reserved.

Neither the lease nor collateral agreement contained in the instrument dated April 7th, 1922, provides for any fuel depot or for any designated storage project or for the location of any storage. It merely provides that if the Gov-

ernment wherein to receive fuel oil for its royalty oils the lessee will construct such storage facilities as are required to conserve such fuel oil and the location of such storage is left entirely to the Government. As to the supplemental agreement of February 9th, 1922, there is no indication in the Record that any of the tankage either that already constructed at Portsmouth, New Hampshire or that which may be constructed at other places is in the least akin to the choosing or selecting or creating or constructing of a new fuel depot.

Discretion.

The statute uses some imperative language. The discretion to take possession of the reserves is a command. The next infinitives connected with the word "directed" are these: "to conserve, to develop, to use and to operate". These words are followed by the words "in his discretion".

There is no room to contend that the discretion is not fully left to the Secretary of the Navy. It is he that must find whether the Naval Reserve oils are secure in the ground or in danger of loss by drainage. The other things that follow in the statute "to use, store, exchange or sell products" do not impose any condition or restriction upon the discretion but are themselves an indication that the oil may be taken out of the reserves and also indicate additional matters left to the discretion of the Secretary of the Navy. It is he that must decide whether "to use, to store, to exchange or to sell" and the clause in between the two above discussed likewise shows matters submitted to the judgment and discretion of the Secretary. He is to decide

the method of developing the lands. No light or insignificant matters are thus committed to the discretion of the Secretary—very clearly and intentionally left to his discretion. In the case at bar the Secretary of the Navy in determining to lease Naval Reserve No. 3 acted upon evidence which seems to us to have been compelling and to have left no other reasonable decision than the one made. Having determined to lease the Reserve, the Secretary of the Navy reserved to himself the right to transform the royalty oils accruing to the Government from the lease into oil products usable by the Navy and capable of being conserved for reserve purposes and further in the exercise of such right made the supplemental agreement of February 9th, 1923, to effectuate the conservation of the equivalents of the Navy's oil in Naval Reserve No. 3 which had been threatened with loss.

In the absence of clear evidence to the contrary courts presume that public officers have properly discharged their official duties. *United States v. Chemical Foundation, No. 127, October Term, 1926*, decided by this Court October 11th, 1926.

Here the Government introduced no evidence of the facts developed by the drilling in Naval Reserve No. 3 to show that the Secretary of the Navy acted arbitrarily or capriciously in determining to lease the reserve because of threatened loss of oil. Furthermore there was no evidence that the Secretary of the Navy abused the discretion conferred on him by the Act of June 4th in any matter in relation to the disposition by him of the Government royalty oils or in relation to the methods chosen by him to conserve the equivalents to be received for said royalty oils.

Moreover, it is to be remembered that if judgment and discretion are vested by statute in an Executive Officer, the courts will refuse to substitute their judgment and discretion for that of the Executive Officer.

In *United States* v. *Speed*, 8 *Wall.* 77, 83 this Court said:

> "It is too well settled to admit of dispute at this day that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract can not be made to depend on the degree of wisdom or skill which may have accompanied its exercise."

That principle has been uniformly followed. In the late case of *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163, 184, this Court said:

> "The proposition that the President, in exercising the power, exceeded the authority given him, is based upon two considerations: First, because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

DeCambra v. *Rogers*, 189 U. S. 119;

State of Louisiana v. *McAdoo*, Secretary of the Treasury, 234 U. S. 627;
Silberschein v. *United States*, 266 U. S. 221.

Severability of the Contracts.

We contend that the contracts here in controversy were authorized throughout—were entirely legal, not only in their substance but in the manner of effecting them and in the preliminaries in relation to them.

For the purposes of the argument, however, and for that alone, let it be taken that, in substance or in method, some of the things here may not be authorized by law.

The matter of severability is one to which the courts have given great attention because of the principle that it is the duty of courts to uphold contracts rather than destroy them. *Chenango Bridge Co.* v. *Binghamton Bridge Co.*, 3 Wall. 51. And where some parts may not be upheld it is the duty of the courts to uphold so much as is lawful if that may be separated out. The question of severability is to be ascertained from the intent of the parties as expressed in the contract or contracts. Among the clear indications of intent the courts find such matters as that the parties have apportioned the various things to be done and the considerations or prices to be paid for each. This is always regarded as a strong indication that the parties intended the particular covenant and the particular consideration indicated for it as being separable from other things in the contract.

McCullough v. *Virginia*, 172 U. S. 102, 113, 114.

Oregon Steam Nav. Co. v. *Winsor*, 20 Wall. (87 U. S.) 64, 70;

United States v. *Hodson*, 10 Wall. (77 U. S.) 395;

Gelpcke v. *City of Dubuque*, 1 Wall. (68 U. S.) 221 (Case No. 79);

United States v. *Bradley*, 10 Peters 343, 360;

Ramsay v. *Creelin* (C. C. A. 8), 254 Fed. 813, 820;

Edgar v. *Ames* (C. C. A. 8), 255 Fed. 835, 838;

3 Williston on Contracts, Section 1781.

As we have hereinbefore shown, the instrument of April 7, 1922, constitutes not a single contract but contains two contracts; first, a lease of the oil lands and second, an agreement as to the disposition of the royalty oils accruing to the lessor under the lease, permitting the Government to choose as to the equivalents to be received by way of compensation but leaving the amount of the compensation fixed and determined, and we have likewise seen that the supplemental agreement of February 9, 1923 was executed pursuant to the exercise by the Government of certain of the options reserved to it in the contract of April 7 in relation to the disposition of its royalty oils.

On the question of severability the above mentioned contracts present four separate matters:

First: The lease contained in the instrument of April 7, 1922 severs itself naturally from anything and everything contained in the collateral agreement embraced in the same instrument and contained in the supplemental agree-

ment of February 9, 1923. The sole consideration for the lease proper is the promise by the lessor to develop the lands and pay a certain specified portion of the oil produced therefrom as royalties. The disposition of the royalties to be received by the lessor constitutes no part of the price paid for the lease. If all of the collateral agreement in relation to the disposition of royalties be held unlawful, the lease may be left to stand stripped of such collateral agreement and the Government may receive its specified portions of the oil produced, which it has agreed constitute full compensation to it for the lease.

SECOND: The collateral agreement contained in the instrument of April 7, 1922, indicates fully the intention of the parties as to the matters involved in it, namely, the disposition as between the parties of the royalty oil, without reference to any provision of the lease proper. We do not deem it material, for the purpose of determining the severability of this collateral agreement from the lease proper, to distinguish in any way between the various options reserved by the Government in said agreement as to the equivalents to be received by way of compensation for its royalty oils because the consideration to be paid for the royalty oils is fixed whether the option to take cash or the option to take fuel oil or other oil products with or without storage facilities be exercised. Nothing in the lease proper as contained in the instrument dated April 7, 1922, enters at all into the consideration to be paid by the lessee for the royalty oils. The collateral agreement as to the royalty oils is therefore by its own terms not only severable but actually severed in the written instrument. This actual

severance results from the fact that it is a separate, independent agreement on its own separate, independent consideration, notwithstanding it is written within the borders of the same instrument as the lease proper. If, therefore, it was lawful to dispose of the royalty oil at the prices fixed and without competitive bidding, this disposition must be upheld. But if, contrary to our expectation, it be held that the officers of the Government might not so dispose of the royalty oils for the prices stated or in the manner stated, then the collateral agreement contained in the written instrument of April 7, 1922, relating to the disposition of the lessor's royalty oils, should be stricken out, leaving the lease to stand on the consideration of the development of the property and the delivery of royalty oils on the scale contracted for.

THIRD: As a subdivision of the discussion as to the agreement disposing of the royalty oils, it is to be noted that the entire agreement shows that the disposition was a sale or an exchange depending upon the option chosen by the Government. Oil certificates are given which amount practically to receipts for royalty oils delivered, both as to the amount of oil and the value thereof. These receipts are redeemable at the option of the Government in cash or in fuel oil or in other oil products suitable for use by the Navy or, to the extent that the Government elects to receive fuel oil for storage facilities necessary (and only for such as are necessary) to conserve the fuel oils so received. If it be held that it was unlawful for the Government to receive for its royalty oils anything but cash, then the other options may be stricken from the contract and

the Government will still receive what it has agreed will be full compensation for its royalty oils. If it be held that the Government might lawfully receive in exchange for its royalty oils, fuel oil and other oil products, but might not lawfully receive storage facilities, then the options for exchanging for fuel oil and other oil products should stand with the option to receive cash and every provision relating to storage construction should be eliminated. Of course, in that event, among the things eliminated would be every provision requiring prior notice for the exercise of the option held to be illegal. And in case all the options other than the option to take payment for the royalty oil in cash disappear, then every provision for notice before the Government would be entitled to cash, would likewise disappear and cash would be payable without notice on the basis provided for. Moreover any provision of the agreement, the effect of which is to limit the exercise of any option in favor of any other option, would be eliminated from the agreement in the event such other option should be eliminated as illegal. This Court has recently had occasion to decide that where promises are in the alternative, the fact that one of them is at the time or subsequently becomes legally impossible of performance, does not relieve the promisor from performance of the legal promise. In *Yankton Sioux Tribe of Indians v. United States*, No. 230 October Term, 1926, decided November 22, 1926, it is said:

> "The general rule undoubtedly is that where there is a legal impossibility of performance appearing on the face of the promise there is no contract in respect of it. But here the undertaking of the gov-

ernment is in the alternative—that either the question of the title of the Indians shall be referred to this court for determination, or, in default of that being done, title in fee shall vest in the Indians. Granted the impossibility of the first alternative, the government, nevertheless, took the risk, and must, in accordance with its definite undertaking to that effect, suffer the stipulated consequence, in virtue of the principle that, where promises are in the alternative, the fact that one of them is at the time, or subsequently becomes, impossible of performance does not, at least without more, relieve the promisor from performing the other."

See also:

Jenson v. *Toltec Ranch Co.*, (C. C. A. 8), 174 Fed. 86, 91;

DaCosta v. *Davis*, 1 Bos. & P. 242, 126, Eng. Reprint 882;

Stevens v. *Webb*, 7 Car. & P. 60;

3 *Williston on Contracts*, Sec. 1779.

Fourth: The supplemental agreement of February 9, 1923, was by the parties themselves, severed and executed separately. If it were not authorized by law or if the method of obtaining it were on account of the absence of competitive bidding or any other thing rendered unlawful, it was clearly severed. As we have hereinbefore seen, it was executed under the exercise by the Government of three of the options reserved in the collateral agreement contained in the instrument of April 7th, 1922. If all of said three options be held illegal, then the supplemental agree-

ment of February 9th, 1923, falls with such options leaving the lawful alternative in the Government to receive cash for its royalty oils. Moreover, if it be held that only the option to receive containers for the fuel oil and other oil products is unlawful, then the supplemental agreement may be severed without affecting the exercise of the options to receive fuel oil and other oil products suitable for use by the Navy in addition to the option to receive cash. Again, if it be held that all of the options are legal but that the supplemental agreement is without authority of law in respect of the places designated for the storage then, such supplemental agreement may be stricken out leaving to the parties the matter of making a lawful agreement in respect of the places where the storage necessary to conserve the fuel oil and other oil products shall be located.

In that connection it is to be borne in mind, as we have hereinbefore shown, that neither the lease nor the collateral agreement contained in the instrument of April 7th, 1922, provides for any fuel depot or for any designated storage project or for the location of any storage but that the matter of the location of any storage which the Government might request be constructed to conserve fuel oil which it might elect to receive in exchange for royalty oils is expressly left to the Government and to the Government alone.

Competitive Bidding.

It is charged in the Bill that the lease is void because of the absence of competitive bidding. No suggestion that competitive bidding is required will be found in the Act of June 4th, 1920.

Moreover there is no general statute of the United States requiring competitive bidding for the leasing of oil lands and indeed there is no such statute requiring competitive bidding for the disposition of government property generally.

Up to February 25th, 1920 the policy laid down by Congress as to the disposition by the Government of its rights in oil lands was found in the placer mining law. Under this law the Government gave the oil lands without advertisement or competitive bidding. On February 25th, 1920 the General Leasing Law was enacted. That Act contained the first provisions which in any way laid down the Government's policy as to the method by which leases on public mineral lands might be acquired and operated and they did not disclose any uniform policy requiring competitive bidding.

Section 2 provides as to coal lands outside of Alaska that the Secretary of the Interior "shall award leases thereon by competitive bidding or by *such other methods as he may by* general regulations adopt". (Italics supplied.)

Section 9 as to phosphate lands authorizes the Secretary to lease "under such restrictions and upon such terms as are herein specified through advertisement, competitive bidding *or such other methods as the Secretary of the Interior may by general regulation adopt.*" (Italics supplied.)

Section 13 authorizes the Secretary to grant permits upon lands not in a producing oil field "*under such necessary rules and regulations as he may prescribe.*" (Italics supplied.)

Section 14 gives to the permittee who may discover oil the right to lease for one fourth of the area in his permit at 5% royalty and $1 per acre. It also gives to the permittee a preference right to a lease of the other three fourths of his acreage, the royalty to be determined by "competitive bidding or fixed by *such other methods as the Secretary may by regulations prescribe.*" (Italics supplied.)

Here it will be seen that there is no competitive bidding whatever as to the original permit nor as to the lease for the first one fourth and not necessarily competitive bidding as to the other three fourths.

Section 17 authorizes the Secretary to lease unappropriated lands within producing oil fields "to the highest responsible bidder by competitive bidding under general regulations." The provision seems to authorize bidding upon the bonus to be paid and to leave the fixing of the royalty to the Secretary of the Interior and such was the practice followed under this section.

Section 18 gives to certain claimants of oil lands the right under certain conditions to lease the lands at a royalty at not less than 12½% and the amount of "royalty shall be fixed by the Secretary of the Interior under appropriate rules and regulations." Naval Petroleum Reserves are excluded from this right. However, the producing wells within the Naval Petroleum Reserves are to be leased by the Secretary of the Interior and it is further provided "that the President may in his discretion lease the remainder or any part of such claim upon which such wells have been drilled and in the event of such leasing said claimant or his successors shall have the prefer-

ence right to such lease; and provided further that he may permit the drilling of additional wells by the claimant or his successor within the limited area of 660 feet theretofore provided for *upon such terms and conditions as he may prescribe.*" (Italics supplied.)

Section 19 gives to certain claimants who have not discovered oil on the lands claimed the right "to lease thereon under such terms as the Secretary of the Interior may prescribe."

As to oil shale lands Section 21 authorizes a lease by the Secretary "under such rules and regulations not inconsistent with this Act as he may prescribe."

Section 22 dealing with oil lands in Alaska provides that the leases "*shall be upon such rental and royalties as shall be fixed by the Secretary of the Interior and specified in the lease* and be subject to re-adjustment at the end of each twenty year period of the lease." (Italics supplied.)

Section 24 dealing with sodium lands provides that "they may be leased by the Secretary of the Interior through advertisement, competitive bidding *or such other methods as he may by general regulations adopt.*" (Italics supplied.)

If any thought is clear as to the Act of February 25, 1920 it is that Congress refused to adopt any one method of negotiating leases covering mineral lands generally or even oil lands. Would anyone for a moment contend that in carrying out any of the provisions of the Act of February 25th, 1920 any general statute as to competitive bidding must be followed? And besides as we have seen there is no such statute in disposing of Government property.

cruing to the United States under the lease, and that in the exercise of such judgment and discretion the Secretary of the Navy disposed of such royalty oils to the lessee, taking from the lessee in consideration therefor an agreement by the lessee that it would compensate the United States for the royalties in either of three ways as the United States might elect, (1) in cash, (2) in fuel oil, (3) in other oil products suitable for use by the Navy. As to fuel oil elected to be received in exchange, the United States might take such oil without containers or it might, but only to the extent necessary, also receive containers for the conservation of the fuel oil received.

Therefore, that "the authority granted by the Act of June 4, 1920 is sufficient to authorize the * * * contract" for the disposition of the royalty oils.

THIRD: That the existing facts on February 9, 1923 were such as to authorize the Secretary of the Navy in the exercise of his judgment and discretion to exchange the royalty oils from the leased lands for fuel oil and other products suitable for Naval use, together with containers necessary for the conservation thereof, and, therefore, that "authority granted by the Act of June 4, 1920 is sufficient to authorize the * * * contract" of February 9, 1923.

FOURTH: That neither of the contracts here involved was upon an inadequate consideration to the United States.

FIFTH: That there is no general statute requiring competitive bidding in negotiating leases of oil lands of the United States or in disposing of its royalty oils.

Therefore, that the absence of competitive bidding will not render invalid the lease or the agreement disposing of the royalty oils; that as to the agreements in relation to such containers as might be necessary "the Act of June 4, 1920 * * * was complete in itself and that it did not repeal nor was it dependent on other acts with relation to the public lands" * * *; that "This special statute, not repealing the general statutes, the two stand together, one as the law relating to a special thing, viz., the naval reserves,—the other relating to general public land matters. It was therefore unnecessary that there be competitive bidding or advertising as to the making of the lease and contract, and other statutes with relation to the method of transacting the general public business of the United States were not applicable to this situation, the special statute fully covering the same" (R. 814).

If, however, it be held on any ground that the agreement as to constructing storage facilities is invalid, we submit that this would not destroy the other valid agreements but in that case every matter relating to the invalid agreements must be stricken from the contracts. This would leave to the United States full compensation and what it has contracted should be full compensation for the lease and for the royalty oils which it disposed of to the lessee.

We submit, however, that the finding of the Circuit Court of Appeals wherein it differs from the finding by the District Court and upon which it reversed the decree of the District Court, namely, the finding that there was bribery of Secretary Fall by Mammoth Oil Company or its

representative is not sustained by any evidence, but consists of inference, drawn not from any fact or circumstance proved but from numerous other inferences, the basic inferences themselves having been improperly and illegitimately drawn.

We submit that the finding and decree of the Court of Appeals should be reversed and that the finding and decree of the District Court should be in all things affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 719.

MAMMOTH OIL COMPANY, SINCLAIR CRUDE OIL PURCHASING COMPANY and SINCLAIR PIPE LINE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

SEPARATE BRIEF OF THE PETITIONER, SINCLAIR PIPE LINE COMPANY.

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UNITED STATES OF AMERICA,
Respondent.

SEPARATE BRIEF OF THE PETITIONER, SINCLAIR PIPE LINE COMPANY.

Certiorari to Review the Decree and Judgment of the United States Circuit Court of Appeals for the Eighth Circuit, Reversing the Decree and Judgment of the District Court of the United States for the District of Wyoming.

Statement of the Case.

Mammoth Oil Company, one of the petitioners, has in its brief set forth the facts involved in the controversy between Mammoth Oil Company and the respondent, United States of America, but in order that the court may be advised con-

cerning the state of the record with which this petitioner is separately concerned, we will briefly state the portion thereof showing the controversy between your petitioner and the respondent, as your petitioner is only incidentally or collaterally interested in the controversy between Mammoth Oil Company, as petitioner, and the respondent.

This suit was commenced in the District Court of the United States for the District of Wyoming by the filing on March 13th, 1924 of a bill in equity by the United States of America as plaintiff (respondent in this court), the relief prayed being the cancellation of a lease executed and delivered to Mammoth Oil Company, dated April 7th, 1922, and a supplemental contract dated February 9th, 1923, and to enjoin further operations by said Mammoth Oil Company under said lease and contract, and to prohibit it, as such lessee, from further trespassing upon the land in controversy situated in the State of Wyoming, which tract of land is commonly known as Naval Reserve No. 3 or "Teapot Dome", and to procure an accounting from said lessee for the oil and other minerals taken from said land under said lease and contract (R., pp. 2 to 52).

The only allegations in the bill applicable to your petitioner are found in paragraph 33 of the original bill of complaint (R., p. 11), which read as follows:

> "3. Defendant Sinclair Pipe Line Company, as plaintiff is informed, claims to have and to hold certain rights derived from defendant Mammoth Oil Company, and by its servants, agents, and employees has erected and maintained certain structures upon the lands described in paragraph 4 hereof. Plaintiff avers that said defendant Sinclair Pipe Line Company, although alleging certain rights to be upon said land, derived from said defendant, Mammoth Oil

> Company, is nevertheless a trespasser upon said lands."

The relief prayed against your petitioner is found in the seventh and eighth subdivisions of the prayer for relief (R., p. 12), which read as follows:

> "(7) That your honorable court commanded the defendant, Sinclair Crude Oil Purchasing Company, and the defendant Sinclair Pipe Line Company, to make discovery in this action of their alleged rights to possession and occupancy of the said lands described in the bill of complaint, or any part thereof, adjudicate the rights of said defendants in the premises, and enter a decree against them in relief of the plaintiff's right of possession.
>
> "(8) Such other and further relief as to your honorable court shall seem meet in the premises."

On March 13, 1924, the District Court appointed receivers of the property (R., p. 52), but excluded from such receivership the pump station, pipe line, material and other equipment theretofore placed upon said land by your petitioner, said order providing (R., p. 53):

> "* * * and PROVIDED, FURTHER, that said receivers shall not take possession or control unless ordered to do so by the further order of this court, of the pump station, bunk houses, warehouse, office, boiler house, reservoir, or pumps or machinery, and other property located therein, nor of the pipe line crossing the real property described in said bill, nor of the four (4) steel oil storage tanks numbered 832, 834 and 835, all said buildings and tanks being located on the Northwest Quarter (NW^1_4) of Section Twenty-seven (27), of said real property; nor shall they

take possession or control of the six (6) cottages located near the northeast corner of Section Twenty-three (23) of said real property, which pump lines, pump stations, cottages, tanks and other buildings in this proviso mentioned are claimed as the property of the defendant, Sinclair Pipe Line Company."

Your petitioner in its answer to said bill denied knowledge of any of the matters alleged in the bill as a basis for cancellation, and put in issue the said matters (R., pp. 76 to 84, inc.), and in paragraph 34 (R., p. 81) alleged that under date of December 20, 1922, the United States, acting by and through the Secretary of the Interior and the Secretary of the Navy, together with Mammoth Oil Company, executed and delivered a contract in writing with your petitioner, by the terms of which your petitioner was accepted by the United States as the nominee and assignee of Mammoth Oil Company to construct and operate the pipe line which Mammoth Oil Company in its lease contract of April 7th, 1922, had agreed to construct or cause to be constructed; that as the result of such contract so executed by the United States, your petitioner did perform said contract of construction, relying upon the validity of said contract, and by virtue thereof it expended in constructing a pump station, pipe line and other equipment upon said naval reserve approximately the sum of seven hundred thousand dollars, and included in such equipment were four steel oil storage tanks upon said reserve which were used and necessary to be used in the operation of said station and the main pipe line upon said naval reserve for the transportation of oil therefrom, and that relying upon said contract your petitioner further constructed its main pipe line from said pump station in a

southerly direction across said reserve for the transportation through said pipe line system of oil that might be tendered to this defendant as a common carrier and extended said pipe line system from said naval reserve in Wyoming to the pipe line system of your petitioner near Freeman, Missouri, at a cost of approximately eighteen million dollars; a copy of said contract is attached as "Exhibit A" to said answer (R., pp. 84, 85, 86).

No additional pleadings were filed and the case, so far as this petitioner was concerned, was tried upon the original bill of compalint and the answer of your petitioner thereto as aforesaid.

For brevity we will hereafter refer to the District Court of the United States for the District of Wyoming as the "District Court" and to the United States Court of Appeals for the Eighth Circuit as the "Court of Appeals".

The case was tried in the District Court, resulting in findings for your petitioner, which court dismissed the bill of the plaintiff below (respondent herein) as against your petitioner; no evidence was offered at the trial or contained in the record to prove or in any way tend to prove or show that your petitioner had any connection with the procuring of or execution of the lease contract of April 7th, 1922, to Mammoth Oil Company, and the first that your petitioner is shown to have had anything to do with the matter was on December 20th, 1922, when the contract hereinabove mentioned was executed between it and the United States, which was eight months after the execution and delivery of the lease to Mammoth Oil Company of April 7th, 1922, the validity of which was the principal matter in controversy between the petitioner, Mammoth Oil Company, and the respondent.

The United States appealed to the Court of Appeals, and that court reversed the findings of the District Court on the question of fraud, and found that the contracts between the United States and the Mammoth Oil Company were fraudulently obtained and remanded the case to the District Court, with instructions (R., p. 852):

> "* * * to enter a decree
>
> "(a) Cancelling the lease of date April 7, 1922, made by the United States with the Mammoth Oil Company and the contract supplemental to said lease signed February 9, 1923, as fraudulent,
>
> "(b) Enjoining the appellees from further trespassing upon the lands of appellant described in said lease, and
>
> "(c) Providing for an accounting on the part of the appellee, Mammoth Oil Company, for the value of all oil and other petroleum products taken under said lease and contract."

With reference to the claims and defenses of your petitioner, the Court of Appeals in its opinion (R., p. 850) said:

> "Appellees, Sinclair Crude Oil Purchasing Company and Sinclair Pipe Line Company, claim certain rights which are derived from appellee, Mammoth Oil Company. The Sinclair Pipe Line Company was granted an easement for pipe lines, buildings and structures necessary to operate the same. It has spent large sums in constructing the same. It has also invested large sums in constructing a pipe line system, relying on the easement or right of way granted across said naval reserve. Its stock is owned by the Sinclair Consolidated Oil Corporation and the Standard Oil Company of Indiana in equal propor-

tions. Mr. Sinclair is or was Chairman of the Board of Directors of Sinclair Consolidated Oil Corporation and probably its largest stockholder.

* * * * * *

"Are these two appellees trespassers upon said naval reserve?

"It is argued that in case of cancellation of the lease and contract appellant be required to do equity in the consequent accounting. The rights of the Sinclair Crude Oil Purchasing Company and the Sinclair Pipe Line Company are based upon the lease of the Mammoth Oil Company. Credit in the accounting or otherwise for moneys expended by these appellees could only be allowed if they were innocent trespassers and expended the money and made the improvements in good faith.

"As our conclusion is that the lease and contract were procured through fraud and corruption, each of the appellees is a *mala fide* trespasser on the Government lands, and therefore no credit for expenditures can be allowed any of them by the Court, and a full accounting of the value of the oil extracted must be rendered. Causey *v.* United States, 240 U. S. 399; United States *v.* Trinidad Coal and Coking Co., 137 U. S. 160; Pan-American Petroleum Co. *et al. v.* United States, 9 Fed. (2d) 761, 773. If appellees or any of them are entitled, upon a cancellation of the lease and contract, on the ground that they were fraudulently obtained from the United States, to credit for moneys expended in carrying out said contract, such relief must come from the Congress."

Specifications of Error.

First: The Court of Appeals erred in finding that there was any evidence as a matter of law to establish fraud in the making of the lease of April 7th, 1922, and the supplemental agreement of February 9th, 1923.

Second: The Court of Appeals erred in holding that Sinclair Pipe Line Company was a trespasser *mala fides* on the government land, as no fraud was alleged or proved as to it.

Third: The Court of Appeals erred in holding that Sinclair Pipe Line Company should be enjoined and restrained from entering upon Naval Reserve No. 3.

Fourth: The Court of Appeals erred in enjoining and restraining Sinclair Pipe Line Company, a common carrier, from entering upon Naval Petroleum Reserve No. 3, without affording it the opportunity to procure from the governmental authorities a right of way or easement to use the surface of said reserve for its pump station, pipe line and equipment necessary to be used in connection therewith, or, failing to procure such authority, without affording it the right to remove from said land the property it had in good faith placed thereon.

ARGUMENT.

Specification of Error No. 1.

As to the first specification of error we adopt the argument set forth in the brief of petitioner, Mammoth Oil Company, filed herein.

Specification of Error No. 2.

As we understand the opinion and decision of the Court of Appeals its conclusion that your petitioner is a *male fide* trespasser on government land appears to be based upon one of two alternatives:

First: That the capital stock of your petitioner, Sinclair Pipe Line Company, was owned one-half by Sinclair Consolidated Oil Corporation, and one-half by Standard Oil Company of Indiana, and that H. F. Sinclair, who controlled Mammoth Oil Company, a separate corporation, was Chairman of the Board of Directors of Sinclair Consolidated Oil Corporation and *probably* its largest stockholder, and that as the court finds that the lease contract was procured by H. F. Sinclair to Mammoth Oil Company by acts which the court finds to constitute legal fraud that therefore the fraud of the chief executive officer and probably largest stockholder of Sinclair Consolidated Oil Corporation, which owns one-half of the capital stock of your petitioner, is fraud to be imputed to your petitioner; or,

Second: That because the court finds that the lease contract of April 7th, 1922, was procured for Mammoth Oil Company by Mr. Sinclair through fraud, that such finding of fraud renders such lease contract void *ab initio*, and no third person or corporation could obtain any rights or equities therein or flowing therefrom, even though they acquired such rights without notice and expended money in good faith relying upon the validity of such lease contract.

With reference to the first proposition—it is not in any way shown by the record that Mr. Sinclair was in any way

in control of petitioner, Sinclair Pipe Line Company, other than that he was the chief executive officer of a corporation which was the owner of one-half of the capital stock of your petitioner; while the rule is generally applied that knowledge of an officer acting for a corporation and on its behalf is imputed to the corporation for which he is an officer and for which he is acting, that rule has no application here, as what we are discussing here is a ruling that knowledge of a fraud found to have been committed by a stockholder of a corporation, which corporation owns only one-half of the capital stock of a third corporation, is such knowledge to such third corporation of such fraud that it is to be imputed to such third corporation.

> "By the great weight of authority, however, since the directors do not individually represent the corporation, and have no power to bind it, except collectively, and as a board, notice of facts casually acquired by individual directors, where they do not communicate their knowledge to the other directors or officers, and do not act officially in the matter, is not notice to the corporation."
>
> —Fletcher Cyclopedia Corporations, Vol. 4, Sec. 2232.
>
> Fidelity and Deposit Co. v. Courtney, 186 U. S. 342, 46 L. Ed. 1193.

> "It is well settled, therefore, as a general rule that (1) where an officer is dealing with the corporation in his own behalf, or (2) is, for any other reason, interested in a transaction adversely to the corporation, knowledge possessed by him in the transaction is not imputable to the corporation."
>
> —Fletcher Cyclopedia Corporations, Vol. 4, Sec. 2243.

In American National Bank *vs.* Miller, 229 U. S. 517, 57 L. Ed. 1310 (p. 521, 522), this court said:

> "This presents another phase of the oft-recurring question as to when and how far notice to an agent is notice to his principal. In view of the many decisions on the subject, it is unnecessary to do more than to apply them to the facts of this case. If Plant, within the scope of his office, had knowledge of a fact which it was his duty to declare, and not to his interest to conceal, then his knowledge is to be treated as that of the bank. For he is then presumed to have done what he ought to have done, and to have actually given the information to his principal.
>
> "But if the fact of his own insolvency and of his personal indebtedness to the Nashville Bank were matters which it was to his interest to conceal, the law does not by a fiction charge the Macon bank, of which he was president, with notice of facts which the agent not only did not disclose, but which he was interested in concealing."
>
> "And even when the officer is acting for the corporation in the matter, as well as for the other corporation or person, his knowledge is not imputable to the corporation, where the facts are such that the other corporation or person is not under any duty to communicate them. In such a case there is a conflict of interest and duty on the part of the officer, and there is no presumption either way as to his communication of knowledge. Thus, if one corporation borrows money from another or enters into any other contract, through the intervention of the common officer, the latter corporation is not chargeable with the officer's knowledge that the money is borrowed or the contract made for an illegal or *ultra vires* purpose."
>
> —Fletcher Cyclopedia Corporations, Vol. 4, Sec. 2248.

Conceding, for the purpose of illustration only, that it should be finally held that Mammoth Oil Company procured its lease from the government through fraudulent acts of Mr. H. F. Sinclair as its President and controlling stockholder, and that he was also the owner personally of one-half of the capital stock of your petitioner (which is much broader than the facts shown by this record), nevertheless under the above and foregoing rules and principles, his knowledge of any fraud theretofore committed in procuring the lease for the Mammoth Oil Company would not be imputed to your petitioner, when it accepted the assignment from Mammoth Oil Company of the right of way or easement to construct the pipe line upon the land described in the lease to Mammoth Oil Company, which assignment was approved in writing by the duly authorized officers of the United States.

With reference to the second proposition—the Court of Appeals found that the contract of assignment which was executed on behalf of the United States by the Secretary of the Interior and the Secretary of the Navy in December, 1922, was executed prior to any attempt on behalf of the government to rescind the lease contract of April 7th, 1922 (R., p. 859).

It is the general rule that fraud does not render a contract void *ab initio* but that such contract is only voidable and is valid until rescinded, or an attempt is made to rescind by the party alleging the fraud.

In Diamond Coal and Coke Co. v. United States, 233 U. S. 236, 58 L. Ed. 936, this court said:

> "A patent secured by such fraudulent practices, although not void or open to collateral attack, is nevertheless voidable, and may be annulled in a suit

> by the government against the patentee or a purchaser with notice of the fraud."

It is clear that any rights or equities in favor of your petitioner accrued to it while such contract was in full force and effect and before any attempt had been made to rescind it by the government, and that your petitioner constructed its station and pipe line upon the naval reserve in reliance upon its right so to do by virtue of its contract with the government made in December, 1922, and there was no evidence offered and no contention made by the government that such contract of December 1922 was procured by your petitioner from the government officials as the result of any fraud or misrepresentation practiced upon the cabinet officers representing the government in the execution thereof.

The Court of Appeals further said (R., p. 851):

> "Credit in the accounting or otherwise for moneys expended by these appellees could only be allowed if they were innocent trespasses and expended the money and made the improvements in good faith."

The Court of Appeals apparently overlooked the fact that your petitioner was not asking or seeking any accounting for the value or cost of its pump station and main pipe line placed upon the naval reserve, but was only asserting that by virtue of the facts and the contract with the government of December, 1922, it was not a trespasser *mala fides* but constructed its line and pump station upon said reserve in good faith and without notice of any defects or fraud in the procuring of said original lease contract of April 1922 by Mammoth Oil Company, and that

thereby it was entitled to maintain its property and pump station upon the surface of the naval reserve. It was shown that your petitioner had expended in excess of seven hundred thousand dollars in constructing its pump station, pipe line and equipment connected and operated in connection therewith upon and across the naval reserve (R., p. 739), and that such pump station and pipe line was a part of its main line system and used for the transportation of oil as a common carrier in interstate commerce, and therefore by virtue of the laws of the United States governing common carrier pipe lines, it was subject to the jurisdiction and control of the Interstate Commerce Commission.

It is our contention that the Court of Appeals, even though it found that the lease contract of April 7th, 1922, to Mammoth Oil Company was voidable on account of fraud in securing the execution of the same, nevertheless the facts herein set forth do not render your petitioner a trespasser *mala fide;* that it is not a trespasser in any respect but was entitled to remain in possession of the surface used by it for its pump station and pipe line system by reason of the fact that it was accepted by the United States, acting by the Secretary of the Navy and the Secretary of the Interior, as the assignee of Mammoth Oil Company of the right of way or easement theretofore granted Mammoth Oil Company, and that such acceptance by the United States of your petitioner as such assignee, there being no contention that such acceptance was procured by any fraud by your petitioner, constituted a new and independent grant of an easement or right of way to your petitioner entirely independent of Mammoth Oil Company; that if it be finally held that your petitioner is a trespasser upon any legal theory, then it could only be held to be an innocent trespasser, as it ac-

quired its easement or right of way by a contract from the government, without any knowledge imputed to it of the invalidity now alleged and held by the Court of Appeals to have existed in said lease contract of April 7th, 1922, and relying upon the validity of its easement or right of way it expended a large sum of money in constructing its pump station and pipe line upon said naval reserve.

Specification of Error Nos. 3 and 4.

The Court of Appeals in its judgment and decree (R., p. 852) directed the District Court to enter a decree—

> "(b) enjoining the appellees from further trespassing upon the lands of appellant described in said lease"—

the effect of which decree, as we construe it, would be that your petitioner, a common carrier pipe line company in possession of a portion of the naval reserve, would be enjoined from further use or possession of such portion of the reserve and the property it has constructed and placed thereon; if it should go upon the land after such injunction was issued to remove any of its property placed thereon, it would be in contempt of the District Court issuing such injunction and the pipe line system would not only cease to operate as a public carrier but would forfeit to the United States the property which it placed thereon and in which it invested in excess of seven hundred thousand dollars, and such property would be confiscated by the United States, merely because your petitioner consructed its pump station and main line upon the naval reserve believing it had the legal right so to do.

We are unable to see that the District Court would have any power, in the execution of such a mandate from the Court of Appeals, to exercise any discretion in the terms of such injunction, as it was directed to enter its decree enjoining your petitioner from further trespassing upon said land.

It is our contention that an injunction granted by a court of equity in a case of this kind to stop further trespass and retention of possession should be in the alternative, and not become finally effective until a reasonable time had been given the common carrier to procure from the proper governmental authorities a right of way or easement to continue to use such surface upon proper payment therefor, or, failing so to do, that it be required to remove from the government land the property it had in good faith placed thereon believing it had a legal right to do so.

This Court has had occasion to consider a somewhat similar contention and in the case of Utah Power & Light Company v. United States, 243 U. S. 389, 61 L. Ed. 791, at page 403, stated the object of a suit of this kind to be as follows:

> "The principal object of the suits, as is said in one of the briefs, is to test the validity of these asserted rights, and, if they be found invalid, to require the defendants to conform to the legislation of Congress, or, at their option, to remove from the Government lands."

That case involved the right of a power and light company and this Court found that it was a trespasser upon Government land because it was occupying the surface thereof without legal right so to do, and yet there was no attempt to

enjoin such further trespass so as to confiscate property placed on Government land without legal rights to do so.

In Chicago, Milwaukee & St. Paul Railway Co. *v.* United States, 244 U. S. 351, 61 L. Ed. 1184, this Court said (p. 359):

> "The decree unconditionally commands the execution and filing of the prescribed stipulation without awarding an alternative injunction and counsel for the Government suggests that it should have enjoined the company from the further occupation of the Reserve, unless, within a prescribed time, the stipulation be executed and filed. The criticism is not without merit, and doubtless is prompted by a careful study of the bill. But, as the Government has not appealed and the company is not complaining of the failure to put the matter in the alternative, the point may be passed without further notice."

We are here complaining of the failure of the Court of Appeals to direct the Trial Court to issue the injunction—if it is to be finally issued—in the alternative, and we contend that the injunction ordered by the Court of Appeals should have been in the alternative, to wit, that unless within a time to be fixed by the Trial Court the pipe line company should procure authority from the proper officials representing the United States to occupy the surface of the Naval Reserve with its pump station, equipment and pipe line, or failing so to do, to remove its property placed on Government land without right, that then and only then should it be enjoined from further trespass or occupation of the Government lands, being Naval Reserve No. 3.

It should be further noted that the building of said pipe line, pump station, etc., involved solely the use of a small

portion of the surface of said land, and to no appreciable extent does it interfere with the full beneficial use of said land by the United States; that to hold it to be a trespasser and enjoined from further entering upon or using such surface will in no way be of benefit to the United States, and the continuation of such use would cause no detriment to the United States, but would cause a serious detriment to your petitioner as a common carrier pipe line serving the public to shut down its pipe line system and cause it to forfeit to the United States the value of the property and equipment it placed upon said naval reserve, believing in good faith that it had the legal right to do so.

A careful reading of the original bill of complaint filed by the respondent in the District Court will show that it was not filed as against your petitioner for the purpose of procuring an injunction against the further use of the land, and a forfeiture of any property placed upon the naval reserve by your petitioner, but the object of the bill was merely to procure a decree of the District Court that your petitioner is a trespasser upon said land and that that court adjudicate the rights of your petitioner in the land and enter a decree against your petitioner "in relief of the plaintiff's right of possession" (R., p. 11, 12); therefore the Court of Appeals in ordering the District Court to issue an injunction enjoining further entry upon said land by your petitioner, went beyond the case made by the bill as originally filed in this suit, and also went further than had ever been sought or argued by counsel for the respondent in the trial of this suit.

Conclusion.

We therefore submit that the judgment and decree of the Court of Appeals should be reversed as to your petitioner, and the decree of the District Court dismissing the bill of respondent should be affirmed, or, if not, that the order or decree directed to be entered by the District Court should be in the alternative, for the reasons hereinbefore set forth.

Edward H. Chandler,
Ralph W. Garrett,
Attorneys for Petitioner,
Sinclair Pipe Line Company.

IN THE

Supreme Court of the United States

October Term, 1926.

No. 728.

MAMMOTH OIL COMPANY, SINCLAIR CRUDE OIL PURCHASING COMPANY and SINCLAIR PIPE LINE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

SEPARATE BRIEF OF THE PETITIONERS SINCLAIR CRUDE OIL PURCHASING COMPANY AND SINCLAIR PIPE LINE COMPANY.

EDWARD B. CHAMBERS,
RALPH W. HARRIS,
Attorneys for Petitioners
Sinclair Crude Oil Purchasing Company and
Sinclair Pipe Line Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 719.

MAMMOTH OIL COMPANY, SINCLAIR CRUDE OIL PURCHASING COMPANY and SINCLAIR PIPE LINE COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

SEPARATE BRIEF OF THE PETITIONER SINCLAIR CRUDE OIL PURCHASING COMPANY.

Certiorari to Review the Decree and Judgment of the United States Circuit Court of Appeals for the Eighth Circuit, Reversing the Decree and Judgment of the District Court of the United States for the District of Wyoming.

Statement of the Case.

Mammoth Oil Company, one of the petitioners, has in its brief set forth the facts involved in the controversy between Mammoth Oil Company and the respondent, United

States of America, but in order that the court may be advised concerning the state of the record with which this petitioner is separately concerned, we will briefly state the portion thereof showing the controversy between your petitioner and the respondent, as your petitioner is only incidentally or collaterally interested in the controversy between Mammoth Oil Company, as petitioner, and the respondent.

This suit was commenced in the District Court of the United States for the District of Wyoming by the filing on March 13th, 1924, of a bill in equity by the United States of America as plaintiff (respondent in this court), the relief prayed being the cancellation of a lease executed and delivered to Mammoth Oil Company, dated April 7th, 1922, and a supplemental contract dated February 9th, 1923, and to enjoin further operations by said Mammoth Oil Company under said lease and contract, and to prohibit it, as such lessee, from further trespassing upon the land in controversy situated in the State of Wyoming, which tract of land is commonly known as Naval Reserve No. 3 or "Teapot Dome," and to procure an accounting from said lessee for the oil and other minerals taken from said land under said lease and contract (R., pp. 2 to 52).

The only allegations in the bill applicable to your petitioner are found in paragraph 32 of the original bill of complaint (R., p. 11), which reads as follows:

> "32. Defendant Sinclair Crude Oil Purchasing Company, as plaintiff is informed, claims to have and to hold certain rights derived from defendant Mammoth Oil Company, and by its servants, agents, and employees has erected and maintained certain structures upon the lands described in paragraph 4

hereof. Plaintiff avers that said defendant Sinclair Crude Oil Purchasing Company, although alleging certain rights to be upon said land, derived from said defendant Mammoth Oil Company, is nevertheless a trespasser upon said lands."

The only relief prayed against this appellee is set forth in the seventh and eighth subdivisions of the prayer for relief (R., p. 12), which reads as follows:

"(7) That your honorable court commanded the defendant Sinclair Crude Oil Purchasing Company, and the defendant Sinclair Pipe Line Company, to make discovery in this action of their alleged rights to possession and occupancy of the said lands described in the bill of complaint, or any part thereof, adjudicate the rights of said defendants in the premises, and enter a decree against them in relief of the plaintiff's right of possession.

"(8) Such other and further relief as to your honorable court shall seem meet in the premises."

On March 13, 1924, the District Court appointed receivers of the property (R., p. 52), but excluded from such receivership the seventeen (17) steel oil storage tanks placed upon said real property and owned by this defendant, said order providing (R., p. 53):

"PROVIDED, HOWEVER, that said receivers shall not take possession or control, unless ordered to do so by the further order of this court, of the seventeen (17) steel oil storage tanks located upon portions of sections twenty-seven (27) and thirty-four (34) of the real property mentioned in said bill, said tanks being numbered 2004 to 2020, both inclusive, nor the contents thereof, which tanks and contents are

claimed as the property of the defendant, Sinclair Crude Oil Purchasing Company."

Your petitioner in its answer to said bill denied specifically any knowledge of any of the matters alleged in the bill as a basis for cancellation, and put in issue the said matters (R., pp. 69 to 76, inclusive), and in paragraph 34 (R., p. 74) alleged that Mammoth Oil Company, by the terms of the lease contract of April 7th, 1922, was granted the right to construct and maintain on the naval reserve tanks and other structures necessary to the development and operation of said property, and that thereafter and during the month of January, 1923, your petitioner purchased from Mammoth Oil Company all its steel oil storage tanks then erected or being built upon said land, and paid said Mammoth Oil Company therefor, and thereby became the owner of seventeen steel oil storage tanks, as the licensee and grantee of the Mammoth Oil Company, and became entitled to maintain said tanks upon said real property in all respects as Mammoth Oil Company was entitled to do by virtue of said lease contract of April 7th, 1922; that said tanks have been used for the storage of royalty oil purchased by your petitioner from the United States of America, being royalty oil produced upon government land in the Salt Creek field in the vicinity of said naval reserve.

No additional pleadings were filed and the case, so far as this petitioner was concerned, was tried upon the original bill of complaint and the answer of your petitioner thereto as aforesaid.

For brevity we will hereafter refer to the District Court of the United States for the District of Wyoming as the

"District Court", and the United States Court of Appeals for the Eighth Circuit as the "Court of Appeals".

The case was tried in the District Court, resulting in findings for your petitioner, which court dismissed the bill of the plaintiff below (respondent herein) as against your petitioner; no evidence was offered at the trial or contained in the record to prove or in any way tend to prove or show that your petitioner had any connection with the procuring of the execution of the lease contract of April 7th, 1922 to Mammoth Oil Company, and the first that your petitioner is shown to have had anything to do with the matter was on December 15th, 1922 and January 1923, these dates being more than six months after the execution and delivery of the lease contract of April 7th, 1922, and more than one year prior to the commencement of this suit in the District Court, the bill being filed in that court on March 13th, 1924.

The United States appealed to the Court of Appeals from the decree of the District Court dismissing its bill, and the Court of Appeals reversed the finding of the District Court on the question of fraud, and found that the contracts between the United States and Mammoth Oil Company were fraudulently obtained, and remanded the case to the District Court with instructions (R., p. 852):

> "* * * to enter a decree
>
> "(a) Cancelling the lease of date April 7, 1922, made by the United States with the Mammoth Oil Company and the contract supplemental to said lease signed February 9, 1923, as fraudulent,
>
> "(b) Enjoining the appellees from further trespassing upon the lands of appellant described in said lease, and

"(c) Providing for an accounting on the part of the appellee, Mammoth Oil Company, for the value of all oil and other petroleum products taken under said lease and contract."

With reference to the claims and defenses of your petitioner, the Court of Appeals in its opinion (R., p. 850) said:

"Appellees, Sinclair Crude Oil Purchasing Company and Sinclair Pipe Line Company, claim certain rights which are derived from appellee, Mammoth Oil Company.

* * * * * *

"Appellee, Sinclair Crude Oil Purchasing Company, evidently controlled by Mr. Sinclair, purchased from the Mammoth Oil Company seventeen steel oil storage tanks on Naval Reserve No. 3, and became substituted as to the rights of the Mammoth Oil Company to maintain the same. This was before an attempt was made or any action taken, to rescind the said contract of April 7, 1922.

"Are these two appellees trespassers upon said naval reserve?

"It is urged that in case of cancellation of the lease and contract appellant be required to do equity in the consequent accounting. The rights of the Sinclair Crude Oil Purchasing Company and the Sinclair Pipe Line Company are based upon the lease of the Mammoth Oil Company. Credit in the accounting or otherwise for moneys expended by these appellees could only be allowed if they were innocent trespassers and expended the money and made the improvements in good faith.

"As our conclusion is that the lease and contract were procured through fraud and corruption, each of the appellees is a *mala fide* trespasser on the Govern-

ment lands, and therefore no credit for expenditures can be allowed any of them by the Court, and a full accounting of the value of the oil extracted must be rendered. Causey *v.* United States, 240 U. S. 399; United States *v.* Trinidad Coal and Coking Co., 137 U. S. 160; Pan-American Petroleum Co. *et al v.* United States, 9 Fed. (2d) 761, 773. If appellees or any of them are entitled, upon a cancellation of the lease and contract, on the ground that they were fraudulently obtained from the United States, to credit for moneys expended in carrying out said contract, such relief must come from the Congress."

Specifications of Error.

First: The Court of Appeals erred in finding that there was any evidence as matter of law to establish fraud in the making of the lease of April 7th, 1922, and the supplemental agreement of February 9th, 1923.

Second: The Court of Appeals erred in holding that Sinclair Pipe Line Company was a trespasser *mala fides* on the government land, as no fraud was alleged or proved as to it.

Third: The Court of Appeals erred in holding that Sinclair Crude Oil Purchasing Company should be enjoined and restrained from entering upon Naval Petroleum Reserve No. 3.

Fourth: The Court of Appeals erred in enjoining and restraining Sinclair Crude Oil Purchasing Company from entering upon Naval Petroleum Reserve No. 3 without affording it the right to remove from said reserve the property it had in good faith purchased and constructed thereon.

ARGUMENT.

Specification of Error No. 1.

As to the first specification of error we adopt the argument set forth in the brief of petitioner, Mammoth Oil Company, filed herein.

Specification of Error No. 2.

As we understand the opinion and decision of the Court of Appeals, its conclusion that your petitioner is a *mala fide* trespasser on government land appears to be based on one of two alternatives:

(1) That your petitioner was *evidently* controlled by Mr. H. F. Sinclair, who also controlled Mammoth Oil Company, a separate corporation, and as that court finds that the lease contract was procured for Mammoth Oil Company by Mr. Sinclair by acts which the court finds to constitute legal fraud, that therefore such fraud is to be imputed to your petitioner; or,

(2) That because the court finds that the lease contract of April 7th, 1922, was procured for Mammoth Oil Company by Mr. Sinclair through fraud that such finding of fraud renders such lease contract void *ab initio*, and no third person or corporation could obtain any right to place or maintain any storage tanks upon said leased premises, as assignee and licensee of Mammoth Oil Company, even though they acquired such right without notice and before any attempt was made to rescind said contract, and ac-

quired said tanks and paid therefor in good faith relying upon their right to maintain the same upon said naval reserve.

With reference to the first proposition, it should be noted that while the Court of Appeals finds that your petitioner was "evidently controlled by Mr. Sinclair", that this statement or inference is contrary to the facts contained in the record.

A. E. Humphries, a witness called on behalf of respondent, testified (R., p. 452):

> "Then the Governor took issue, and he was finally advised by someone present that the contract would be properly guaranteed, and the Prairie was offered for one, the Prairie Oil and Gas Company, and the Sinclair Crude Oil Purchasing Company for the second. I turned to the Governor and remarked to him that the two mentioned companies were entirely satisfactory to me. The Governor then in reply said, 'If they are satisfactory to you they are to me,' so that closed that incident. It is my recollection that Mr. Blackmer was the spokesman at the time this statement was made, but at the stage when the securities were offered, Mr. O'Neil talked for the Prairie and Mr. Sinclair for the Sinclair Crude Oil Purchasing Company. I don't remember that R. W. Stewart took any part save that he might have — my recollection is that he consulted with Mr. Sinclair before Mr. Sinclair volunteered their company as one of the guarantors.
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> "Stewart and Sinclair represented the Sinclair Crude in making this contract and O'Neil represented the Prairie. I had no knowledge of any other purpose of their being there." (R., p. 454).

H. L. Phillips, a witness called on behalf of plaintiff, testified (R., p. 457):

> "I was a Director and Vice President of Sinclair Crude Oil Purchasing Company on November 17, 1921. I was not present when Exhibit 125 was drafted. I first saw it in Chicago in November, 1921. I don't remember the date. At that time the stock of Sinclair Crude Oil Purchasing Company was owned one-half by the Standard Oil Company of Indiana and one-half by the Sinclair Consolidated Oil Corporation.
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> "I think Mr. Sinclair was in Charge when that agreement was put to the Board of Directors. I didn't discuss it with him before it was adopted. I do not remember that Mr. R. W. Stewart, who I understood was then Chairman of the Board of Directors of the Standard of Indiana, was present when the contract was up for consideration by the Board of Directors.
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> "Mr. Sinclair and Mr. Stewart, who signed the guarantee agreement for the directors (Pl. Ex. 124) were not at that time directors of the Sinclair Crude Oil Purchasing Company. I presume I saw that form of guarantee at the time the Directors' meeting was held in Chicago. I have no recollection of it definitely. When the contract between Humphreys Mexia Company and the Humphreys Texas Company and the Prairie and Sinclair Crude Oil Purchasing Company was presented to me it had been tentatively signed by Mr. Sinclair and Mr. Stewart for the Directors (R., p. 461).
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> "Referring to the meeting of the Board of Directors where the contract by Sinclair Crude and

> Prairie with Continental (Pl. Ex. 125) was ratified in November, 1921, I am not sure whether I was advised at that meeting that Continental had bought this oil at $1.50 a barrel when I voted to approve the guartnee of Continental's contract. I may have been advised of the fact after that just a few days; I am not sure."

We think the effect of the record then shows in substance that the capital stock of your petitioner was owned one-half by Standard Oil Company of Indiana and one-half by Sinclair Consolidated Oil Corporation—that R. W. Stewart was Chairman of the Board of Directors of the Standard Oil Company of Indiana, and that H. F. Sinclair was Chairman of the Board of Directors of Sinclair Consolidated Oil Corporation, and that these two chairmen represented your petitioner in dealing with A. E. Humphries and signed the contract for the Directors, which act and contract was thereafter ratified by the Board of Directors of your petitioner, and that neither Mr. Sinclair nor Mr. Stewart was a director or officer of your petitioner. We therefore think that it is purely an inference for the Court of Appeals to base its conclusion that your petitioner was "evidently controlled by Mr. Sinclair" upon the statements above set forth, and that seems to be the foundation for the conclusion that your petitioner is a *mala fide* trespasser upon the naval reserve in maintaining its tanks thereon which it purchased from Mammoth Oil Company.

With reference to the second position, the Court of Appeals found that your petitioner purchased from Mammoth Oil Company the seventeen steel oil storage tanks on Naval Reserve No. 3 before any attempt was made or any

action taken to rescind the said contract of April 7th, 1922 (R., p. 850).

It is the general rule that fraud does not render a contract void *ab initio* but that such contract is only voidable, and is valid until rescinded, or an attempt is made to rescind by the party alleging the fraud.

In Diamond Coal and Coke Co. *v.* United States, 233 U. S. 238, 58 L. Ed. 936, this court said:

> "A patent secured by such fraudulent practices, although not void or open to collateral attack, is nevertheless voidable, and may be annulled in a suit by the government against the patentee or a purchaser with notice of the fraud."

There was no evidence offered and no contention made by the government that your petitioner had anything to do with the procuring of the lease contract of April 7th, 1922, and it is clear that it had bought and paid for said tanks a year before any attempt was made by the government to claim that fraud was practiced in procuring said lease contract of April 7th, 1922.

Specification of Error Nos. 3 and 4.

The Court of Appeals in its judgment and decree (R., p. 852) directed the District Court to enter a decree—

> "(b) enjoining the appellees from further trespassing upon the lands of appellant described in said lease"—

the effect of which decree, as we construe it, would be to enjoin your petitioner from entering further upon said naval reserve without affording it the right to remove

from said reserve said seventeen oil storage tanks which are merely placed upon the surface of said land, and prevent your petitioner from further using said tanks to store the royalty oil it purchased from the government, and would forfeit to the United States said tanks, which could be easily removed therefrom without injury to said land, except to do so would violate the injunction ordered to be issued by said District Court.

We conclude that the District Court would be without power, in the execution of such a mandate from the Court of Appeals, to exercise any discretion in the terms of such injunction, as it is directed to enter its decree enjoining your petitioner from further trespassing upon said land, and therefore said tanks would be forfeited to and confiscated by the United States, and your petitioner could make no effort to remove said tanks therefrom without violating such injunction.

It is our contention that an injunction granted by a court of equity in a case of this kind to stop further trespass should be in the alternative, and not become finally effective until a reasonable time had been given your petitioner to procure from the proper governmental authorities an easement or right to continue to use such surface upon proper payment therefor, or, failing so to do, that it be required to remove from the government land its property which it had in good faith placed thereon, believing it had a legal right to do so.

We have discussed this question more at length in the brief filed herein on behalf of Sinclair Pipe Line Company, one of the petitioners herein, and will therefore, for the sake of brevity, refer to that discussion and not repeat it in this brief.

The original Bill of Complaint only sought a decree of the District Court adjudging your petitioner a trespasser upon the land and the entry of a decree in relief of the plaintiff's right of possession (R., 11, 12) and was apparently not brought for the purpose of securing a decree of the District Court enjoining further entry upon the land, the effect of which would be to declare forfeiture or confiscation of the property placed thereon by your petitioner, and no such issue was presented to either Court by counsel; the Court of Appeals in decreeing such injunction and forfeiture went beyond the case made by the Bill, as we view it, and granted the relief of confiscation and forfeiture when no pleading had been filed or contention made in either Court that the respondent was entitled to any such relief if the Court of Appeals should reverse the decree of dismissal of the District Court. Doubtless counsel for the respondent in preparing the Bill realized that it would only be fair and equitable to obtain, in case they prevailed, a decree adjudging defendants to be in possession of the surface of said reserve without legal right, and then if such decree was affirmed upon appeal and your petitioner did not remove its property placed thereon, the relief of injunction could be secured from the District Court in an ancillary Bill filed for that purpose, if necessary. As hereinbefore stated your petitioner did not ask or seek either in the District Court or in the Court of Appeals, nor did it make any contention in either Court, that it was entitled to recover any accounting against the respondent, but merely that it had the equitable right to remain in possession, and if not, then to have a reasonable time to remove its property placed thereon, if it could not procure proper authority from the Governmental officials to authorize it

to maintain in the future its tanks upon said Naval Reserves, as such tanks are movable and merely placed upon the surface of the land and in no way injure such surface.

Conclusion.

We therefore submit that the judgment and decree of the Court of Appeals should be reversed as to your petitioner, and the decree of the District Court dismissing the bill of respondent should be affirmed, or, if not, that the order or decree directed to be entered by the District Court should be in the alternative, for the reasons hereinbefore set forth.

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